



1996

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Edward Chase

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Recommended Citation

Edward Chase, *The Third Circuit and the Landlord's Noncompetition Promise: The Use and Misuse of Intent Theory*, 41 Vill. L. Rev. 989 (1996).

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THE THIRD CIRCUIT AND THE LANDLORD'S NONCOMPETITION PROMISE: THE USE AND MISUSE OF INTENT THEORY

EDWARD CHASE*

I. INTRODUCTION

BECAUSE of the limits on the scope of federal jurisdiction, it is rare to find noteworthy federal decisions on matters of landlord-tenant law. Lease disputes rarely generate exciting questions under the Constitution or laws of the United States. Additionally, the court's role in a diversity case is limited to applying a state court's holdings to the facts of the case rather than the more interesting and creative role of promulgating a federal common law of leases. In exceptional diversity cases, however, the federal court may find that there are no state precedents on the issues presented by the facts. In such cases, the federal court's role is the creative one of predicting, based on the most relevant existing decisions, what rule of law the state court would follow if presented with such issues and applying that imaginatively-constructed rule to the facts of the case.¹

This Article concerns such an exceptional case. In *J.C. Penney Co. v. Giant Eagle, Inc.*,² the J.C. Penney Company sought an injunction to prevent a Giant Eagle supermarket from operating a pharmacy in a shopping center near Pittsburgh in violation of an exclusive pharmacy privilege granted by the landlord to Penney in its 1978 lease.³ Finding no dispositive precedents from the Pennsylvania Supreme Court involving the landlord's noncompetition promise, the United States Court of Appeals for the Third Circuit decided the case based upon the available decisions.⁴ The Third Circuit concluded that, if the Pennsylvania court were presented

* Professor of Law, Rutgers Law School, Camden. The author wishes to thank Craig Oren, Allan Stein and Hunter Taylor for valuable comments on a draft of this Article.

1. See, e.g., *Doubleday & Co. v. Curtis*, 763 F.2d 495, 500 (2d Cir. 1985) (stating "we must attempt to divine the likely response of our state brethren"). A court of appeals reviews a district court's determination of state law de novo, without deference to the district court's determination. See *Salve Regina College v. Russell*, 499 U.S. 225 (1991) (noting nature of review).

2. 85 F.3d 120 (3d Cir. 1996).

3. *Id.* at 123.

4. *Id.*

with a noncompetition covenant today, it would commit itself to a contractual theory of interpretation of such covenants where ascertainment and effectuation of the intent of the parties to the covenant is the primary desideratum.⁵

A court's reliance on intent effectuation instead of the property principle of strict construction of restrictive covenants affecting land use would ordinarily be important on questions involving the scope, and in some instances the existence, of the noncompetition covenant as between the parties to the covenant—the landlord and the tenant. Having isolated intent theory as the basis of decision in Pennsylvania noncompetition covenant cases, however, the Third Circuit proceeded to use that theory to decide an issue of third-party rights—the question of whether Giant Eagle, which entered into its lease in 1977, was charged with notice of the subsequent noncompetition promise made by the landlord to Penney in the 1978 lease.⁶ The Third Circuit also used intent theory to suggest an answer, disclaiming a holding on the point, to still another question implicated in the case.⁷ Apart from being barred from operating a pharmacy because of the restriction contained in Penney's lease, Giant Eagle could have been enjoined on the independent ground that Giant Eagle's own lease limited its permitted uses of the premises and did not authorize operation of a pharmacy.⁸ The court strongly suggested that intent theory required a construction of the Giant Eagle lease that disabled it from operating a pharmacy on the premises.⁹

The Third Circuit's attribution of intent theory to the Pennsylvania Supreme Court, its use of that theory to bind Giant Eagle to the terms of the Penney lease, and its use of intent theory to suggest a limit on the terms of Giant Eagle's own lease are all innovative decisions.¹⁰ These three matters represent the focus of this

5. *Id.* at 123-25.

6. *Id.* at 125-29.

7. *Id.* at 123 n.4.

8. *Id.*

9. *Id.* at 127; *see id.* at 129 (discussing necessity of effectuating parties' intent and contract theory as means for doing so). One judge, Judge Stapleton, dissented from the holding that Giant Eagle had notice of the restriction in Penney's lease. *Id.* at 128 (Stapleton, J., dissenting). Judge Stapleton also indicated that Giant Eagle's own lease did not bar Giant Eagle from operating a pharmacy. *Id.* at 129-31 (Stapleton, J., dissenting).

10. It is interesting to note that in one sense it is incorrect to say that the *J.C. Penney* case represents the views of the United States Court of Appeals for the Third Circuit. The court consisted of Judges Stapleton and McKee from the Third Circuit, and Judge John R. Gibson, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation. *Id.* at 121. Judge Gibson

Article. After briefly recounting the facts of *J.C. Penney* and discussing the Third Circuit's extraction of intent theory from the relevant Pennsylvania decisions, Part I presents in some detail the court's response to the issues raised by *Giant Eagle*.¹¹ *Giant Eagle*'s arguments and the court's disposition of those arguments provide the background for the evaluation, which occurs in Part II, of the important questions decided by the court.¹² Briefly, the discussion concludes that the Third Circuit's choice of intent theory for assessing the existence and scope of noncompetition covenants is in general a commendable development, that the Third Circuit's use of intent theory to bind *Giant Eagle* to the terms of the 1978 *Penney* lease is supportable if important limits on the holding are recognized, and that the Third Circuit's employment of intent theory to suggest a limit on the uses permitted to *Giant Eagle* under its own lease is both unnecessary and unfortunate. Part III offers some brief concluding observations that attempt to put the Third Circuit's use of intent theory in noncompetition covenant cases in the broader perspective of the movement in contract law from classical to modern principles.¹³

II. PRELIMINARIES

A. *Facts*

In 1962, J.C. Penney's predecessor, the Thrift Drug Company of Pennsylvania, leased a store in the Quaker Village Shopping Center in Leetsdale, Pennsylvania for a maximum term, including renewals, of thirty years, ending in 1993.¹⁴ The lease restricted Thrift Drug to the operation of a drug store and granted Thrift Drug an "exclusive" on that use.¹⁵ Quaker Village promised not to permit another tenant of the shopping center to operate a pharmacy or to dispense prescriptions during the term of the lease.¹⁶

wrote the majority opinion. *Id.* The Third Circuit judges split: Judge McKee joined the majority opinion, while Judge Stapleton dissented. *Id.* at 121; *id.* at 129 (Stapleton, J., dissenting).

11. For a discussion of the Third Circuit's response to various issues raised by *Giant Eagle*, see *infra* notes 49-127.

12. For a discussion of the important questions decided by the Third Circuit, see *infra* notes 49-127 and accompanying text.

13. For a discussion of the author's critique of the Third Circuit's use of intent theory in noncompetition covenant cases, see *infra* notes 128-259 and accompanying text.

14. *J.C. Penney*, 85 F.3d at 121. The lease required that Thrift Drug use the premises only for operation of a retail drug store. *Id.*

15. *Id.*

16. *Id.*

Thrift Drug recorded a memorandum of the lease.¹⁷ In 1969, Penney acquired all of Thrift Drug's rights under the 1962 lease.¹⁸ In 1977, Giant Eagle leased a store in Quaker Village to operate a supermarket and the lease, like Thrift Drug's, granted Giant Eagle an exclusive right on that use.¹⁹

At the landlord's request, Penney in 1978 relocated its store in Quaker Village and executed a new lease with the landlord.²⁰ The new lease granted Penney the exclusive right to operate a pharmacy in the shopping center and provided renewal options which, if exercised, would have extended Penney's right to operate the pharmacy past the 1993 limit contained in the original Thrift Drug lease.²¹ The 1978 lease provided that the Thrift Drug lease was to terminate one day after the new lease term started, and Penney subsequently recorded a lease cancellation agreement stating that the 1962 lease was "null and void."²²

In 1990, Giant Eagle sought to expand its supermarket operation to include a pharmacy.²³ To accommodate Giant Eagle, Quaker Village sought a waiver of Penney's exclusive pharmacy privilege.²⁴ Penney refused.²⁵ Although informed of the refusal, Giant Eagle opened a pharmacy in 1992.²⁶ Invoking the federal court's diversity jurisdiction, Penney obtained a preliminary injunction against the Giant Eagle pharmacy, which was affirmed without opinion on appeal.²⁷ Penney later obtained a permanent injunction barring Giant Eagle from operating a pharmacy during the

17. *Id.*

18. *Id.* at 122.

19. Giant Eagle's exclusive was subject to an exception for the existing Thorofare store in the shopping center. *Id.* at 122.

20. See *J.C. Penney Co. v. Giant Eagle, Inc.*, 813 F. Supp. 360, 364 (W.D. Pa. 1992), *aff'd*, 995 F.2d 217 (3d Cir. 1993) (restating finding of fact no. 11). The new location was 20 feet away from Penney's old location. Appellee's Brief at 4, *J.C. Penney, Inc. v. Giant Eagle, Inc.*, 85 F.3d 120 (3d Cir. 1996) (No. 95-3054).

21. See *J.C. Penney*, 85 F.3d at 122 (discussing term of lease and option for renewal and extension of lease for three additional five-year terms).

22. *Id.* at 122, 126.

23. *Id.* at 122.

24. *Id.* at 123.

25. *Id.*

26. *Id.*

27. See *J.C. Penney Co. v. Giant Eagle, Inc.*, 995 F.2d 217 (3d Cir. 1993) (affirming lower court decision to enjoin Giant Eagle); *J.C. Penney Co. v. Giant Eagle, Inc.*, 813 F. Supp. 360, 361 (discussing diversity of citizenship), *aff'd*, 995 F.2d 217 (3d Cir. 1993). Giant Eagle is a Pennsylvania corporation, and J.C. Penney is a Delaware corporation with its principal place of business in Texas. *J.C. Penney*, 813 F. Supp. at 361. Penney also sued Stanley Gumberg, the owner of Quaker Village, a Pennsylvania resident. *Id.*

term of the 1978 lease, including renewals of the lease.²⁸ Giant Eagle appealed the district court's grant of the permanent injunction to the Third Circuit, which affirmed the district court.²⁹ As Pennsylvania had the only significant interest in the case, its law applied.³⁰

B. *The Pennsylvania Supreme Court and Noncompetition Covenants*

As the Third Circuit noted, the Pennsylvania Supreme Court originally applied principles of real estate law to interpret restrictive covenants in shopping center leases.³¹ Under this property approach, the Pennsylvania court rejected the view that the intent of the parties, as revealed by the language and circumstances of the transaction, should govern the interpretation of restrictions. Instead, the Pennsylvania Supreme Court looked "at the plain language of the restriction, glean[ing] the intent of the parties from the language alone."³² If the language of the noncompetition covenant was ambiguous, the court applied a rule of strict construction to resolve the ambiguity against the tenant.³³ As one Pennsylvania case colorfully put the matter, in drafting a restriction on real estate the "scrivener acts at his peril: if his creation is not self-sustaining it is nothing."³⁴

There were "early rumblings of change" from the court in the important decision of *Great Atlantic & Pacific Tea Co. v. Bailey*,³⁵ but no about-face commitment to the principles of contract law.³⁶ In *Great Atlantic*, three justices, in a plurality opinion, ruled against a tenant's suggested liberal construction of a noncompetition covenant and instead applied the rule of strict construction of restrictions on land use.³⁷ The plurality opinion, however, was matched by the vigorous dissent of Justice Roberts, who was joined by two other justices.³⁸ Justice Roberts "rejected the uncritical application of the doctrine of strict construction to defeat the obvious purpose

28. *J.C. Penney*, 83 F.3d at 123.

29. *Id.* at 120.

30. *J.C. Penney*, 813 F. Supp. at 367 (citing *Zoppala v. Hubs Foods, Inc.*, 683 F. Supp. 127, 129 (W.D. Pa. 1987)).

31. *J.C. Penney*, 85 F.3d at 123.

32. *Id.*

33. *Id.* at 124.

34. *Id.* at 123 (quoting *Siciliano v. Misler*, 160 A.2d 422, 425 (Pa. 1960)).

35. 220 A.2d 1 (Pa. 1966). For a further discussion of *Great Atlantic & Pacific Tea Co.*, see *infra* notes 185-211 and accompanying text.

36. *J.C. Penney*, 85 F.3d at 123.

37. *Great Atl. & Pac. Tea Co.*, 220 A.2d at 4.

38. *Id.* at 4-7.

for which a [restrictive] covenant was included in a lease agreement" and argued instead that the court's role was to ascertain the intent of the parties to the covenant "in light of the apparent purpose of the covenant and the conditions existing at the time the lease agreement was executed."³⁹ In essence, as the Third Circuit later saw the matter, Justice Roberts argued for the rejection of real estate law and the use of contract law to interpret land use restrictions.

The division revealed in the 1966 *Great Atlantic* decision remained unresolved until 1980,⁴⁰ when the Pennsylvania Supreme Court unanimously decided the case of *Teodori v. Werner*.⁴¹ In that case, the court rejected the rule of independent covenants that historically applied to leases.⁴² The court held that a tenant, on the basis of the contract rule of dependency of promises, could assert the landlord's breach of a noncompetition covenant as a defense to the landlord's suit to dispossess the tenant for nonpayment of rent.⁴³ Although *Teodori* presented the question of a tenant's remedies, rather than of the proper interpretation of the tenant's rights under the noncompetition covenant, the Third Circuit found that the case nevertheless represented "a substantial change in the Pennsylvania Supreme Court's approach to shopping center leases with exclusive rights."⁴⁴ This case, therefore, provided a proper basis for the Third Circuit's attempt to predict what the Pennsylvania court would do if presented with the issues raised in *J.C. Penney*. To the Third Circuit, the *Teodori* case indicated the Pennsylvania Supreme Court's new approach to noncompetition covenants in its holding, its reasoning and in the unanimity of the justices. The *Teodori* court applied the contract rule of dependency instead of the real estate principle of independency of promises to determine the tenant's remedies for breach of the noncompetition covenant.⁴⁵ The *Teodori* court arrived at that holding, as noted by the Third Circuit, on the basis of its recognition of the "importance of exclu-

39. *J.C. Penney*, 85 F.3d at 124.

40. In *Sun Drug Co. v. West Penn Realty Co.*, 268 A.2d 781 (Pa. 1970), the court was divided, as it had been in *Great Atlantic & Pacific Tea Co. See Great Atl. & Pac. Tea Co.*, 220 A.2d at 1 (reflecting division of court). Justice Roberts again authored a powerful dissent. *Sun Drug*, 268 A.2d at 785-86 (Roberts, J., dissenting).

41. 415 A.2d 31 (1980).

42. *Id.* at 33, 34.

43. *Id.* at 33. The contract rule of dependency of promises is more appropriately applied to landlord-tenant relationships than the old property law of independent promises. *Id.*

44. *J.C. Penney*, 85 F.3d at 125 (citing *Teodori*, 415 A.2d at 31).

45. *Teodori*, 415 A.2d at 33.

sive rights in shopping center leases in assuring the mix of quality businesses essential to a shopping center's financial success."⁴⁶ The court's unanimous opinion, written by Justice Roberts, was joined by Justice Eagen, who had written the plurality opinion in favor of strict construction in *Great Atlantic*.⁴⁷ Accordingly, after a canvassing of the relevant state decisions, the *J.C. Penney* court concluded that "we must analyze the relationships in this case under the rules announced in *Teodori*."⁴⁸

C. *Issues, Arguments and Holdings*

Giant Eagle presented four issues for review by the Third Circuit.⁴⁹ Three of the issues were based on the property law of covenants running with the land.⁵⁰ First, Giant Eagle questioned whether Penney's 1962 exclusive pharmacy right, which was the only restriction on record when Giant Eagle leased in 1977, and which the 1978 lease sought to extend, was still in existence.⁵¹ Giant Eagle argued that the 1962 lease did not survive Penney's 1978 change of location in the shopping center and Penney's express nullification of the earlier lease.⁵² Second, assuming that the original lease survived the 1978 modification and that Giant Eagle was charged with constructive notice of it by its recordation, Giant Eagle questioned whether the 1962 lease provided notice of the exclusive pharmacy right asserted by Penney—the right to bind Giant Eagle beyond 1993.⁵³ Giant Eagle argued that the earlier lease provided notice only of the exclusive pharmacy right granted therein.⁵⁴ Because Penney's exclusive right created in 1962 ended by its terms in 1993, Giant Eagle argued that it was free to compete with Penney

46. *J.C. Penney*, 85 F.3d at 125 (citing *Teodori*, 415 A.2d at 31).

47. *See id.* (noting "Justice Eagen's joining in Justice Roberts's *Teodori* opinion demonstrates the abandonment of the strict approach to exclusive rights which Justice Eagen adhered to in his *Great Atlantic & Pacific Tea Co.* plurality opinion").

48. *Id.*

49. *Id.* at 123. The Third Circuit divided Giant Eagle's second issue into the second and third issues indicated in the text. *See id.* at 123-29 (demonstrating court's division of second and third issues). Giant Eagle's stated third issue—whether its own lease prohibited the operation of a pharmacy—thus became the fourth issue indicated in the text. *Id.*

50. For a further discussion of the issues presented by Giant Eagle, see *infra* notes 62-127 and accompanying text.

51. *See J.C. Penney*, 85 F.3d at 123 (noting argument of Giant Eagle that lease did not survive subsequent move).

52. For a further discussion of Giant Eagle's argument, see *infra* notes 62-81 and accompanying text.

53. *J.C. Penney*, 85 F.3d at 123-28.

54. *Id.* at 128.

after 1993.⁵⁵ Third, Giant Eagle questioned whether it was charged with notice at all.⁵⁶ Giant Eagle argued that it was a tenant and not a "purchaser" charged under the recording act with constructive notice of the terms of the 1962 lease.⁵⁷ Finally, if Giant Eagle was not bound by the exclusive pharmacy privilege granted by the landlord to Penney in the 1962 lease, Giant Eagle questioned whether its own lease independently prohibited the operation of a pharmacy.⁵⁸ Giant Eagle argued that the terms of its lease specifying a supermarket use were descriptive rather than restrictive, and therefore, allowed it to operate a pharmacy.⁵⁹

The Third Circuit rejected Giant Eagle's arguments based on the law of covenants running with the land, using instead intent theory to break new ground on the question of a third party's notice of exclusive rights created in another contract. Although the court disclaimed a holding on the question of whether the Giant Eagle lease, by its own terms, prohibited a pharmacy use,⁶⁰ the court nevertheless used its conclusion that the lease *was* prohibitive to justify its holdings on the question of whether Giant Eagle was bound by the terms of the restriction in the Penney lease.⁶¹ Whether a holding or not, as the resolution that the court indicated for this last issue is as novel as its conclusion that bound Giant Eagle to the terms of the 1978 Penney lease and is based on the same theory of intent effectuation, this last issue also deserves study.

1. *Whether Penney's 1962 Lease Survived the 1978 Modification*

In simple terms, the first question under the law of running covenants was who came first, Giant Eagle or Penney? The objectionable transaction according to Giant Eagle was the 1978 agreement extending Penney's exclusive right beyond 1993, which was the outside limit established by the 1962 lease.⁶² Under the prop-

55. For a further discussion of the argument that Giant Eagle was allowed to compete with J.C. Penney after 1993, see *infra* notes 82-101 and accompanying text.

56. *J.C. Penney*, 85 F.3d at 128-29.

57. For a further discussion of the argument that Giant Eagle was not a purchaser, see *infra* notes 102-11 and accompanying text.

58. *J.C. Penney*, 85 F.3d at 124-25.

59. For a further discussion of the terms of Giant Eagle's lease, see *infra* notes 112-27 and accompanying text.

60. *J.C. Penney*, 85 F.3d at 123 n.4.

61. *Id.* at 127, 129.

62. The district court apparently saw the question of Penney's enforcement of its pharmacy exclusive against Giant Eagle as a matter of interpretation; because the 1962 and 1978 Penney leases "expressly, unambiguously, and continuously" prohibited another pharmacy, the court held that Giant Eagle was barred from

erty law of covenants running with the land, the landlord's 1978 promise to Penney burdened the landlord in his capacity as the owner of all of the land in the shopping center that had not been leased as of 1978.⁶³ While a tenant who *subsequently* leased a part of the shopping center property would have been subject to the exclusive right created in Penney (assuming the tenant had notice of the earlier lease), an earlier tenant would not have been bound.⁶⁴ Covenants do not "run backwards, as it were."⁶⁵ Stated differently, rights that have previously vested by a landlord's prior contracts relating to land cannot be undermined retroactively by subsequent contracts.

Because, however, Penney was operating in Quaker Village under a lease that dated originally from 1962, well before Giant Eagle's 1977 lease, Giant Eagle's argument that its lease had priority under the law of covenants was based on the further claim that the 1978 Penney lease was an entirely new lease lacking any continuity with the 1962 lease. Giant Eagle made two arguments to support that claim.⁶⁶ First, after entering into the 1978 lease, Penney recorded a cancellation of the earlier 1962 lease, declaring it null and void.⁶⁷ Second, Penney's move to a new location as part of the 1978 transaction destroyed the noncompetition right originally created because the law of easements "does not permit the transfer or extension of a restrictive covenant to different premises."⁶⁸ To rephrase this last question in property terms, Giant Eagle argued that the attempt of the landlord and Penney to transfer the benefit of the restrictive covenant from the original dominant estate—Pen-

competition. *J.C. Penney Co. v. Giant Eagle, Inc.*, 813 F. Supp. 360, 368 (W.D. Pa. 1992), *aff'd*, 995 F.2d 217 (3d Cir. 1993). The real issue, however, was not ambiguity but enforceability; conceding that Penney's leases unambiguously gave Penney an exclusive pharmacy right, the question was whether Giant Eagle, as either a predecessor of the 1978 lease, or a successor with notice only of the original terms of the 1962 lease, was bound to respect Penney's unambiguous pharmacy right. *Id.*

63. See *J.C. Penney*, 813 F. Supp. at 368 (discussing exclusive promise to Penney in 1978 lease and Giant Eagle's challenge to that exclusive right provision).

64. See RESTATEMENT (FIRST) OF PROPERTY § 530 (1944) (noting "successors" to land burdened by promise are bound by promise).

65. 2 RICHARD R. POWELL, THE LAW OF REAL PROPERTY § 17A.02[5], at 17A-48 (1996). See generally ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY §§ 8.13-.33 (2d ed. 1993) (discussing property rule regarding covenants running with land).

66. Appellant's Brief at 10-13, *J.C. Penney Co. v. Giant Eagle, Inc.*, 85 F.3d 120 (3d Cir. 1996) (No. 95-3054).

67. *Id.* at 6.

68. *Id.* at 9.

ney's original location in the shopping center—to nondominant land—Penney's new location—destroyed the benefit.⁶⁹

The court gave the easement argument short shrift, dispatching it with the observation that it was "the type of traditional property law argument which the Pennsylvania Supreme Court rejected in *Teodori*."⁷⁰ As discussed above, the Third Circuit noted that *Teodori* signaled "a substantial change" in the Pennsylvania court's approach to noncompetition covenants.⁷¹ Applied to the easement argument, the court read *Teodori* to mean that contract principles governed the resolution of noncompetition issues so exhaustively that "traditional property-law restrictions on restrictive covenants and negative easements . . . do not apply."⁷²

The intent theory of *Teodori* also allowed the court, in a more elaborate analysis, to disregard the recitation in the 1978 lease which declared the 1962 lease as "null and void."⁷³ According to the court, that provision "must be read with the other provisions in the 1978 lease and the circumstances surrounding the execution of the 1978 lease."⁷⁴ The circumstances surrounding the 1978 lease indicated that Penney and the landlord intended for Penney to continue to have the exclusive pharmacy right that it had long enjoyed under the 1962 lease.⁷⁵ The circumstances considered by the court included: Penney's objection when an early draft of the lease omitted the exclusivity term; Penney's insistence on the one-day overlap between the 1962 and 1978 leases in order to maintain continuity with the earlier lease; Penney's agreement to move to the new location only on the condition of maintenance of its exclusive right; and the landlord's testimony that the landlord intended to continue Penney's exclusive right.⁷⁶ The terms of the 1978 lease confirmed the court's understanding of the circumstances—Quaker Village granted an exclusive right to Penney and warranted that no prior tenant held a right to compete.⁷⁷

69. See *Crimmins v. Gould*, 308 P.2d 786 (Cal. Ct. App. 1957) (holding misuse of benefit of easement is basis for termination when misuse cannot be enjoined). Such may have been the case in *J.C. Penney*, as Penney had already moved and operated at its new location for a substantial time when Giant Eagle raised the issue.

70. *J.C. Penney Co. v. Giant Eagle*, 85 F.3d 120, 126 (3d Cir. 1996).

71. *Id.* at 125. For a discussion of the Pennsylvania Supreme Court's approach to noncompetition covenants, see *supra* notes 31-48.

72. *J.C. Penney*, 85 F.3d at 126.

73. *Id.* at 123.

74. *Id.*

75. *Id.* at 125.

76. *Id.* at 125-26.

77. *Id.* at 126.

Of course, the recited terms and circumstances only involved Quaker Village and Penney, not Giant Eagle. Because Giant Eagle negotiated its lease during the same time as the negotiations culminating in the 1978 Penney lease, however, the court indicated that under *Teodori's* intent approach, the circumstances and language of the Giant Eagle lease were also relevant in determining the significance of the "null and void" provision in the Penney transaction.⁷⁸ The essence of the court's review of the Giant Eagle lease and negotiations was that Giant Eagle was awarded an exclusive right to operate a supermarket in Quaker Village, comparable to Penney's right, and that the landlord did not in any way contemplate giving Giant Eagle the right to operate a pharmacy. Furthermore, the court concluded that Giant Eagle's negotiator either actually knew of Penney's exclusive right or should have known because he knew that exclusives were common in shopping center leases.⁷⁹ The importance to Penney of Giant Eagle's presence (as a supermarket rather than a pharmacy) was revealed by a provision in the 1978 lease conditioning Penney's obligation to operate upon Giant Eagle's opening and operation.⁸⁰ The upshot of the court's analysis appears to be that the landlord intended to allocate separate exclusives to Penney and Giant Eagle, that Giant Eagle was aware of and benefitted from that allocation, and that Penney was dependent on Giant Eagle's presence in the shopping center as a noncompetitor. The Third Circuit's review of the Giant Eagle and Penney leases led to the holding that Penney's 1962 exclusive rights survived the 1978 lease, giving Penney priority under the law of covenants running with the land.⁸¹

2. *Whether Notice of the 1962 Lease, Assuming It Existed, Included Notice of Penney's Right to Bind Giant Eagle Beyond 1993*

If the 1962 lease survived the 1978 modification, Giant Eagle, as a successor to property burdened by the landlord's promise of exclusive rights to Penney, would have been subject to an injunction for violating those exclusive rights if Giant Eagle had notice of those rights. Assuming that the recording of the 1962 lease furnished notice, the relevant question was, notice of what? Giant Ea-

78. *Id.* at 125. The Penney negotiations culminating in the 1978 lease began in 1975. *Id.* at 122.

79. *Id.* at 125.

80. *Id.* at 125-27.

81. *See id.* at 126 (stating that "[b]ecause Penney's 1978 lease preserves its 1962 exclusive right, we hold that Penney's exclusive right predates Giant Eagle's 1977 lease").

gle argued that it had notice only of the extent of the exclusive pharmacy right specified in that 1962 lease, which ended in 1993.⁸²

The court rejected that argument, concluding that notice of the 1962 lease, if it existed, included (1) not only notice of the terms of that lease granting a thirty-year pharmacy exclusive to Penney, but also (2) notice that the 1962 lease granted Penney a *right*, subsequently exercised in 1978, to extend the duration of its exclusive use rights beyond the originally-established thirty years, even though that renewal right was not expressly stated in the 1962 lease.⁸³ To a property purist, the second conclusion might well seem extravagant; it provoked the dissent in the case. While the court's conclusion on this critically important phase of the case is clear, its analysis in support of the conclusion is unfortunately far less clear, so that some attempt at reconstruction is necessary.

The court started its analysis with the proposition that a successor to burdened property who takes with notice of previously-granted rights is bound by the proper interpretation of those rights, even if that interpretation is not the one that it would have put on the terms of the prior lease.⁸⁴ Formally, this proposition gave the court a basis for reading Penney's 1978 extension of the pharmacy privilege back into the original 1962 lease, if the court could find that those 1978 actions were augured by a "proper interpretation" of the 1962 lease. To determine the proper interpretation of the earlier lease, the court relied on the proposition, derived from its study of the Pennsylvania Supreme Court's treatment of noncompetition covenants, that the parties' intent, rather than strict construction, was the touchstone under Pennsylvania law for deciding the scope and meaning of the 1962 covenant.⁸⁵

In applying the "proper interpretation" principle to the facts of the case, the court made what appears to be a two-step argument. First, recalling *Teodori's* emphasis on the importance of exclusive rights as a means of assuring "the mix of quality businesses essential to a shopping center's financial success,"⁸⁶ the court determined that the landlord in *J.C. Penney* indeed intended to control the mix of tenants in the shopping center through the specific allocation of

82. Appellant's Brief at 20-21, *J.C. Penney Co. v. Giant Eagle Inc.*, 85 F.3d 120 (3d Cir. 1996) (No. 95-3054).

83. *J.C. Penney*, 85 F.3d at 125.

84. *Id.* at 127 (citing 3 MILTON R. FRIEDMAN, *FRIEDMAN ON LEASES* § 28.601 (3d ed. 1990)).

85. *Id.* at 125.

86. *Id.*

exclusive marketing rights to different retail tenants.⁸⁷ The court based this conclusion on the fact that all three of the relevant leases contained such exclusives.⁸⁸ The court noted that controlled development by the landlord creates an "interrelationship" among the major tenants in a shopping center which contributes to the economic welfare of all of the parties in the center.⁸⁹ Controlled development maximizes the diversity of retail establishments, and hence the diversity of services offered. Because the landlord's compensation in shopping center leases is often computed as a percentage of a tenant's gross sales, the advantage of a large volume of customers is obvious.⁹⁰ The protection against competition that results from the landlord's grant of separate exclusives in the center benefits the tenant by protecting the tenant's investment in the location⁹¹ and helps the landlord to attract quality businesses to the center.⁹² The *J.C. Penney* court apparently regarded the recognition and fostering of such mutually beneficial relationships to be what the Pennsylvania Supreme Court meant in *Teodori* when it emphasized the importance of interpreting noncompetition covenants in light of the "economic realities" of modern shopping centers.

The landlord's intent to create a relationship of mutual economic dependency and benefit among the tenants in a shopping center is effective only if the landlord's grant of an exclusive right to each tenant is binding on other tenants. The interrelationship of mutual benefit and responsibility would be threatened if Giant Eagle were to compete with Penney. As a second stage in its analysis, the court identified several reasons for finding that notice of the 1962 lease included notice of Penney's right to create a binding extension of the exclusive beyond the thirty year term set out in the

87. *Id.*

88. *Id.* at 127.

89. *Id.*

90. *Id.* at 124-25. The court quoted, as had *Teodori*, the statement from the *Restatement (Second) of Property* that the "mere presence in a lease of a noncompetition promise by the landlord justifies the conclusion that it is essential that the promise be observed if the tenant is to conduct his business on the leased premises profitably." *RESTATEMENT (SECOND) OF PROPERTY (LANDLORD AND TENANT) § 7.2 cmt. b (1977).*

91. *J.C. Penney Co. v. Giant Eagle, Inc.*, 813 F. Supp. 360, 363 (W.D. Pa. 1992), *aff'd*, 995 F.2d 217 (3d Cir. 1993). Testimony in the district court indicated that non-prescription sales accounted for almost one-half of Penney's sales in Quaker Village, and that loss of the exclusive right would produce a "ripple effect" because "when J.C. Penney loses prescription drug business of its customers, it also loses all of the other non-prescription sales that accompany the customers' purchase of prescription drugs." *Id.*

92. *J.C. Penney*, 85 F.3d at 125.

1962 lease.⁹³ First, as a party to one of the three leases that implemented the interrelationship among tenants, Giant Eagle received the benefit of membership in the economic enterprise created by the landlord.⁹⁴ The court implied that such participation indicated that a participant shared in the general intent to further the interrelationship by honoring the exclusives granted to other tenants. As the court said, the "interrelationship between the tenants . . . was part of the parties' underlying intent."⁹⁵

Second, the court noted that Giant Eagle had no basis in 1977 for inferring that Penney's exclusive right was limited by the 1993 expiration date specified in the 1962 lease.⁹⁶ Penney's 1962 lease and Giant Eagle's 1977 lease created fixed terms and provided for renewal, yet neither the language nor the circumstances surrounding those leases suggested any restriction on the tenant's ability to negotiate additional renewals.⁹⁷ To the contrary, the 1962 lease provided that Penney's pharmacy exclusive would continue throughout "any renewal or extension" of the 1962 lease, indicating that renewals beyond the expiration date were contemplated.⁹⁸ Giant Eagle thus presumably knew that Penney was free at any time to negotiate an extension of its lease.

Third, neither the language nor the surrounding circumstances of any of the leases indicated an intent by any party to restrict the landlord's ability to control the mix of the shopping center by granting exclusives.⁹⁹ To the contrary, "the evidence about the interrelationship between the landlord and the several tenants demonstrates that the parties intended to allow the landlord to negotiate continuations of existing leases, preserving their exclusive rights."¹⁰⁰ On the basis of these factors, the court held that the landlord and Penney intended to allow an extension of the 1962 exclusive right "as they might see fit in the future," that inter-

93. *Id.* at 127-28.

94. *Id.* at 128.

95. *Id.*

96. *Id.* at 127.

97. *Id.*

98. *Id.* The 1962 lease, which is quoted in the district court opinion, provided that the landlord "covenants and agrees that it will not during the term of this lease, or any renewal or extension thereof," lease to a competitor of the tenant. *J.C. Penney*, 813 F. Supp. at 363. The Third Circuit read the reference to "any renewal" to mean any renewal that the parties may subsequently agree upon, rather than to the three renewals specifically provided for in the 1962 lease. For a criticism of that reading, see *infra* note 144 and accompanying text.

99. *J.C. Penney* 85 F.3d at 128.

100. *Id.* at 127.

pretation of the 1962 lease permitted such an extension, and that the proper interpretation was binding on Giant Eagle.¹⁰¹

3. *Whether Giant Eagle Was a "Purchaser" Charged with Notice of the Terms of the 1962 Lease*

Regardless of the proper interpretation of the 1962 lease, Giant Eagle would not have been bound by that lease unless the lease's recording gave Giant Eagle notice. Pennsylvania's recording statute provides that the recording of a memorandum of an instrument constitutes constructive notice of the full terms of the underlying instrument to subsequent "purchasers, mortgagees and judgment creditors."¹⁰² Relying on the established principle that recordation gives notice only to those parties enumerated in the recording act, Giant Eagle argued that it was not charged with constructive notice of Penney's lease because Giant Eagle was a tenant rather than a purchaser.¹⁰³ Giant Eagle's argument assumed that the term "purchaser" in the recording statute carries its ordinary connotation of a sale—the passage of title for a consideration to a "purchaser"—and asserted that a tenant acquires possession but not title.¹⁰⁴ Giant Eagle distinguished its facts from *Commonwealth v. Monumental Properties, Inc.*,¹⁰⁵ in which the Pennsylvania Supreme Court assimilated a residential lease to a sale (a "purchase") for purposes of applying the state Consumer Protection Law directed against fraudulent sales practices.¹⁰⁶ In *Monumental Properties*, the court specifically disclaimed any intent to abolish the distinction between possession and title for all purposes and justified its conclusion that a tenant was a "purchaser" under the consumer statute on the policy consideration of maximizing the number of beneficiaries entitled to protection of an important piece of progressive legislation.¹⁰⁷ Noting that J.C. Penney charged substantially higher prescription drug prices than Giant Eagle and had the only pharmacy for a five mile stretch on one side of the Ohio River, Giant Eagle argued that relevant policy did not justify a broad reading of

101. *Id.* at 128.

102. PA. STAT. ANN. tit. 21, § 407 (West 1995).

103. Appellant's Brief at 15, *J.C. Penney Co. v. Giant Eagle, Inc.*, 85 F.3d 120 (3d Cir. 1996) (No. 95-3054) (citing *United States v. Union Livestock Sales Co.*, 298 F.2d 755 (4th Cir. 1962)).

104. *Id.*

105. 329 A.2d 812 (Pa. 1974).

106. *Id.* at 816.

107. *Id.* at 823-24.

the recording statute to favor a major corporate entity like Penney.¹⁰⁸

Although Giant Eagle framed its argument in terms of the parties bound by the recording of a memorandum ("subsequent purchasers"), a significant part of its concern was with the extent of notice provided by the recorded short-form memorandum of the 1962 lease, which omitted the restrictive covenant.¹⁰⁹ The court answered that concern with a *reductio ad absurdum*: if Giant Eagle was correct that it was not a purchaser, it would not have had notice even if the entire lease had been recorded.¹¹⁰ Giant Eagle's argument would have made it impossible for a prior tenant to give a subsequent tenant constructive notice of the terms of a lease. The court rejected Giant Eagle's basic argument that a tenant is not a "purchaser" in the relevant sense, by relying on the holding in *Monumental Properties* that a lease is a sale.¹¹¹

4. *Whether Giant Eagle's Own Lease Barred Use of the Premises as a Pharmacy*

The Giant Eagle lease could have provided that the tenant "shall use the premises as a food and grocery super market and for no other purpose," but neither this phrase nor any comparable restrictive language was present in the lease.¹¹² The mandatory "shall" might have been important to the question of whether Giant Eagle was required to continuously operate in the shopping center, as opposed to ceasing operations and paying any minimum rent specified in the lease.¹¹³ Giant Eagle, however, could have promised to continuously operate a supermarket without necessarily having promised to limit itself to that use.¹¹⁴ Under the usual rule of

108. See Appellant's Opening Brief at 17, *J.C. Penney* (No. 95-3054).

109. *Id.* at 17-20.

110. *J.C. Penney Co. v. Giant Eagle, Inc.*, 85 F.3d 120, 128-29 (3d Cir. 1996).

111. *Id.* at 129.

112. *J.C. Penney Co. v. Giant Eagle, Inc.*, 813 F. Supp. 360, 363 (W.D. Pa. 1992), *aff'd*, 995 F.2d 217 (3d Cir. 1993). The Giant Eagle lease provided: "[T]enant shall use the demised premises as a food and grocery super market for the sale of items customarily sold in the markets which it operates in the greater Pittsburgh area" *Id.*

113. See CUNNINGHAM ET AL., *supra* note 65, §6.25, at 277-78 (stating tenant is not required to occupy and use premises in absence of covenant to do so). For comparison, the use provision of the 1978 Penney lease provided that the premises "may be used for the operation of a drug store" *J.C. Penney*, 813 F. Supp. at 364.

114. CUNNINGHAM ET AL., *supra* note 65, § 6.24, at 277 (noting lease provision that "authorizes or even requires" use for stated purpose does not prohibit other uses).

strict construction applied to restrictions on a tenant's use, the ambiguity created by the absence of an express restriction would have been resolved, as the dissent noted, "in favor of the least restrictive interpretation," a reading which would have allowed Giant Eagle to operate a pharmacy after the 1993 expiration of Penney's exclusive right.¹¹⁵ Such a construction might have been buttressed by the fact that the 1962 Penney lease *did* expressly restrict the tenant to a drugstore use "only," indicating that the landlord knew how to create a restriction when one was intended.¹¹⁶

The district court found the Giant Eagle lease ambiguous because it failed to permit a pharmacy, rather than because it failed to restrict the tenant to a supermarket.¹¹⁷ This approach under the rule of strict construction would curiously put the burden of clarity on the party seeking free land use, rather than on the party (the landlord) seeking to restrict land use. Nevertheless, the district court resolved the ambiguity on the basis of circumstantial evidence of the intent of Giant Eagle and the landlord, rather than on the basis of strict construction of the lease document itself.¹¹⁸ The district court noted that in 1977 Giant Eagle did not operate a supermarket containing a drugstore.¹¹⁹ That observation would seem to be relevant only on the assumption that the parties were agreeing—without expressly having said so—to maintain the 1977 status quo. The assumption was undercut, however, by the fact, noted by Giant Eagle on appeal, that Giant Eagle added several products and services to its Quaker Village location after 1977, without objection by the landlord.¹²⁰ As further circumstantial evidence, the district court noted that Giant Eagle was aware, at the time of negotiating its lease in 1977, that Penney's 1962 exclusive right was going to continue, without interruption, via the 1978 Penney lease.¹²¹ Because the 1962 pharmacy right expired in 1993, Giant Eagle's knowledge that the 1962 lease continued after 1978 would not have imported knowledge of a prohibition against Giant Eagle's operation of a pharmacy after 1993. The district court noted, however,

115. *J.C. Penney*, 85 F.3d at 131 n.2 (Stapleton, J., dissenting).

116. *J.C. Penney*, 813 F. Supp. at 362. The 1962 lease provided that "the demised premises shall be used by Tenant only for the operation of a retail drugstore business." *Id.*

117. *Id.* at 369 n.4.

118. *Id.* at 369.

119. *Id.*

120. *Id.* at 365. In the years since 1977, Giant Eagle had introduced various new product lines and services, while adding the pharmacy to its Quaker Village location. *Id.*

121. *Id.* at 369.

that the 1978 lease contained a warranty by the landlord that no existing tenant at Quaker Village had been granted similar rights to those granted to Penney, apparently suggesting that the landlord's statement of a warranty constituted notice to Giant Eagle of the fact asserted by the warranty.¹²²

Because the Third Circuit held that Penney's exclusive right prevented Giant Eagle from operating a pharmacy, the court stated that it did not reach "the issues arising from Giant Eagle's own lease."¹²³ Nevertheless, the evidence that became relevant in light of the court's intent effectuation methodology provided a temptation that must have been difficult to resist. The owner of Quaker Village testified that there was "no thought or discussion" of a Giant Eagle pharmacy during the 1977 negotiations,¹²⁴ and that he "did not in any way contemplate giving Giant Eagle the right to operate a pharmacy."¹²⁵ After concluding that Giant Eagle was bound by the "proper interpretation" of the 1962 lease, the court stated that "[i]f there is any difficulty in reaching this conclusion, there is nothing in the 1962 lease, *the 1977 Giant Eagle lease*, or the 1978 Penney lease that permits a conclusion that the parties intended to allow Giant Eagle to operate a pharmacy, a right that [the landlord] had previously granted to Penney."¹²⁶ The italicized portion of the quote indicates the court's view that the Giant Eagle lease by its own terms "certainly did not give [Giant Eagle] a right to operate a pharmacy."¹²⁷ Although not a holding, the Third Circuit's answer to the question of limits imposed by Giant Eagle's own lease became a factor in deciding the issues the court did address. As discussed below, the Third Circuit's conclusion on this issue is novel and unfortunate.

III. A CRITIQUE OF THE COURT'S OPINION

The *J.C. Penney* court held that Giant Eagle could not operate a pharmacy in Quaker Village because it was bound by the landlord's prior grant of an exclusive pharmacy privilege to Penney, and the court further suggested that Giant Eagle was barred from operating a pharmacy because its own lease did not authorize such use of the

122. See *id.* (stating "[t]he 1978 lease expressly stated that the landlord agreed that no other tenant at Quaker Village had been granted similar rights").

123. *J.C. Penney Co. v. Giant Eagle, Inc.*, 85 F.3d 120, 123 n.4 (3d Cir. 1996).

124. *Id.* at 122.

125. *Id.* at 125.

126. *Id.* at 127.

127. *Id.* at 129.

premises.¹²⁸ These matters are discussed in Part A below. The *J.C. Penney* court extracted its vigorous principle of intent effectuation as the touchstone for judicial analysis of noncompetition covenants from some state court decisions in which there were disputes between a landlord and a tenant over the interpretation of the meaning of ambiguous language in noncompetition covenants, rather than dispute over third party rights. Nevertheless, the court's analysis in *J.C. Penney* raises questions about the utility and possible limits of the intent approach on such questions of interpretation.¹²⁹ These matters are discussed in Part B below.

A. *Limits on Giant Eagle's Right to Operate a Pharmacy*

The Third Circuit held that the 1962 lease agreement survived Penney's subsequent modification and cancellation of the prior lease, that the proper interpretation of the 1962 lease allowed the landlord and Penney to bind Giant Eagle to extensions of the original pharmacy exclusive granted to Penney beyond 1977, and that Giant Eagle as a "purchaser" was charged with notice of the 1962 lease.¹³⁰ Each of those matters requires comment.

1. *The 1962 Lease Survived the 1978 Modification Agreement*

The court's holding that Penney's 1978 lease continued the protections of the 1962 lease is correct. An opposite holding would have imposed an unnecessary and unreasonable limit on the flexibility of contracting parties in a shopping center context. Although Giant Eagle did not begin competing until the 1990s, the implication of its argument that the original lease did not survive the 1978 extension is that Penney, as of 1978, lost its protection against competition from any prior tenant. No tenant who leased prior to 1978, including Giant Eagle, however, needed the protection provided by such a holding.

Any tenant leasing space in Quaker Village before 1978 would have had record notice of Penney's exclusive thirty-year exclusive pharmacy privilege. An investigation prior to 1978 would have revealed that Penney was in fact still operating its pharmacy. A tenant leasing before 1978 thus would have had no basis for relying on a right to compete prior to 1993. A holding that Penney's modifica-

128. *Id.* For a critique of the court's holding in *J.C. Penney*, see *infra* notes 130-84 and accompanying text.

129. For a discussion of the intent approach toward questions of interpretation and the court's use of it, see *infra* notes 185-256 and accompanying text.

130. *J.C. Penney*, 85 F.3d at 128-29.

tion of the 1962 agreement *reduced* the thirty-year duration of the exclusive privilege would have deprived Penney of a right that it bargained for and could have resulted in a windfall to Giant Eagle. The real issue for Giant Eagle was whether the 1978 lease could operate to *lengthen* the original pharmacy exclusive beyond 1993.¹³¹ That question, however, was separately and sufficiently raised by Giant Eagle's argument that, in 1977, it had record notice only of Penney's rights lasting through 1993.

In addition to being unnecessary, a holding that the 1962 lease failed to survive the 1978 transaction would have been unreasonable in that it would have dramatically increased the risk, and hence reduced the availability, of subsequent modifications or cancellations of prior agreements sought by the parties to those agreements. As conditions change, parties to an ongoing contract, such as a lease, may seek to change the terms of those contracts. The right to modify agreements to accommodate changing conditions is particularly important in an ongoing enterprise such as a shopping center which continuously undergoes a turnover of tenants.

For various business reasons, Quaker Village sought to move Penney to a new location in the 1970s.¹³² Penney was amenable, if it could retain its pharmacy exclusive.¹³³ It would have been an unreasonable limitation on "the common business practice of adjusting the terms of agreements as conditions change"¹³⁴ to hold that Penney lost the pharmacy exclusive as against prior tenants by agreeing to the 1978 lease. The court's decision on this first issue clearly furthered one of the principles that the Third Circuit extracted from its review of the Pennsylvania decisions—that courts should "realistically interpret shopping center leases" to "give effect to the economic realities at work in shopping centers."¹³⁵

It might be noted, however, that the court's rejection of Giant Eagle's argument that easement law prohibited the 1978 modifica-

131. *Id.* at 130 (Stapleton, J., dissenting). The decision cites no rationale for Giant Eagle's decision to open a pharmacy in 1992, a year ahead of the expiration of Penney's exclusive right created by the 1962 lease. Perhaps Giant Eagle concluded that the way was clear because the 1962 lease, as it argued, was no longer in effect in 1992; or perhaps, assuming the validity of the 1962 lease, Giant Eagle calculated that it made sense to provoke and dispose of the inevitable litigation as early as possible. Despite potential liability for its early competition, it seems clear, as the text says, that Giant Eagle's main concern was freedom to compete after 1993, for the remaining 24 years left on its lease. *Id.*

132. *Id.* at 122.

133. *Id.*

134. United States *ex rel.* Crane Co. v. Progressive Enter., Inc., 418 F. Supp. 662, 663-64 (E.D. Va. 1976).

135. *J.C. Penney*, 85 F.3d at 126.

tion agreement may have been too facile. To suggest that the Pennsylvania Supreme Court has submerged all "traditional property-law restrictions" on noncompetition covenants in the universal solvent of intent effectuation clearly and unwisely goes beyond what was necessary to decide the case. The law of easements forbids the extension of the benefit of an appurtenant easement to property not originally included in the easement.¹³⁶ The standard case is one in which the owner of a right-of-way easement acquires additional property and uses the right-of-way over the servient property for access to the new land. The reason for the prohibition is to prevent an increased burden on the servient estate. Although a right-of-way is an affirmative easement, there is perhaps in principle no reason why the rule against increasing the burden on the servient estate could not be made with reference to a noncompetition covenant, which creates a kind of negative easement: the burden on any other tenant having a right to carry the same line of goods and services as Penney could be increased were Penney to move to a substantially larger location or one nearer to the competitor. Giant Eagle, however, could not invoke *that* kind of increased burden, as Giant Eagle had no right to compete with Penney at the time of Penney's move. The relevant burden imposed on Giant Eagle, as it noted in its brief, derived not from the change in location, but from the change in *duration* of the exclusive—from Penney's attempt to extend it beyond 1993.¹³⁷ The court might more wisely have answered Giant Eagle's easement analysis and avoided predicting the Pennsylvania Supreme Court's views on a host of knotty easement issues, by saying that the duration issue was raised separately by Giant Eagle's notice argument. Further, the court could have held that Penney's move—twenty feet away from its original location—was nothing more than a *de minimis* substitution of one dominant estate for another, even assuming that the prohibition against enlargement of nondominant property applies to negative easements and that Giant Eagle was a proper party to raise the issue.¹³⁸

136. See, e.g., *Crimmins v. Gould*, 308 P.2d 786 (Cal. Ct. App. 1957) (holding extension of right-of-way easement to nondominant property is misuse of benefit; easement was terminated where injunction was impossible); *Brown v. Voss*, 715 P.2d 514 (Wa. 1986) (recognizing rule against extension of right-of-way easement to nondominant property, but limits plaintiff to damages).

137. Appellant's Brief at 12 n.6, *J.C. Penney Co. v. Giant Eagle, Inc.*, 85 F.3d 120 (3d Cir. 1996) (No. 95-6054).

138. Appellee's Brief at 4, *J.C. Penney Co. v. Giant Eagle, Inc.*, 85 F.3d 120 (3d Cir. 1996) (No. 95-6054).

2. *Binding Giant Eagle to the Proper Interpretation of Penney's 1962 Exclusive Pharmacy Right*

The centerpiece of the Third Circuit's holding that Giant Eagle was bound by the proper interpretation of the 1962 lease was the concept of the "interrelationship" of mutual dependence and benefit that existed among the major tenants in the Quaker Village Shopping Center.¹³⁹ The landlord created the interrelationship by allocating separate "exclusives" to different retail tenants in Quaker Village. The essence of the interrelationship was that "in each lease, the tenant undertook obligations concerning its business, but also received assurances about the other tenants within the shopping center."¹⁴⁰

To evaluate the importance and novelty of the court's holding, it is useful to consider briefly the ways in which a landlord's "assurance" to a tenant of a protected exclusive right might be implemented. Such a review will reveal that the landlord and Penney failed to take several important steps to ensure Penney's protection and that the Third Circuit's decision effectively makes up for that omission. Whether and to what extent the court's decision is justified must also be considered.

Consider a hypothetical tenant *A* who seeks an assurance from the landlord that tenant *A* will enjoy the exclusive right to operate a pharmacy in the landlord's shopping center. There are three bases on which tenant *A* can receive "assurances" about the extent of protection secured by the landlord's grant of the requested exclusive right. First, the recording act gives tenant *A* access to prior leases to determine whether any right inconsistent with the exclusive sought by tenant *A* exists. The recording act also gives tenant *A* protection against competition by subsequent tenants who have notice of tenant *A*'s right. The landlord and tenant *A* can assist the notice function of the recording statute by carefully defining the extent and duration of the exclusive in their lease. Second, assurances about prior tenants can be addressed in the lease granting the exclusive to tenant *A*. The landlord can warrant that no prior inconsistent right

139. See *J.C. Penney*, 85 F.3d at 127 (discussing interrelationship of parties).

140. *Id.* An earlier use of economic interdependency occurred in *Tooley's Truck Shop, Inc. v. Chrsanthopoulos*, 260 A.2d 845 (N.J. 1970), in which the court used the concept to imply a covenant requiring the tenant to continuously operate its business on the leased premises during reasonable business hours. *Id.* at 849; see also *Ingannamorte v. Kings Super Markets, Inc.*, 260 A.2d 841, 844 (N.J. 1970) (interpreting lease language and circumstances to require tenant's continuous operation). But see *Walgreen Az. Drug Co. v. Plaza Ctr. Corp.*, 647 P.2d 643, 648 (Az. Ct. App. 1982) (noting "New Jersey seems to stand alone" in using economic interdependency as a basis for implying covenant of continuous operation).

has been granted, or can except from tenant A's exclusive right any prior right that does exist. A warranty against, or an exception for, prior rights is useful to tenant A independently or as a hedge against a faulty record search. Third, the landlord can protect tenant A's exclusive by inserting in subsequent leases an express prohibition against a competing use or an express limitation to a different use than that pursued by tenant A.

With these methods of "assurance" in mind, it is useful to consider Penney's position in Quaker Village in 1978. At that point, Penney wanted, perhaps in consideration of its agreement to relocate, an exclusive right that would extend past 1993, and the landlord was willing to grant it. Because of earlier failures by the landlord and Penney, however, only one of the devices discussed above for protecting Penney was available, and it provided the least satisfactory protection. The recorded 1962 lease did not specifically provide for a *right* in Penney to renew beyond 1993.¹⁴¹ In leasing to Giant Eagle in 1977, the landlord did not expressly prohibit Giant Eagle from operating a pharmacy, nor did it expressly limit Giant Eagle to a supermarket use.¹⁴² The 1978 lease to Penney *did* contain the landlord's warranty that no right inconsistent with Penney's exclusive right to operate a pharmacy beyond 1993 existed.¹⁴³ The warranty would be breached unless Giant Eagle was prohibited from competing in 1993 because of record notice of Penney's 1962 lease or because of a restriction in its own lease. But Penney's remedy for such a breach would have been damages against the landlord rather than an injunction against Giant Eagle. A requirement that Penney endure the competition and be made whole by damages would have been unsatisfactory compared to a right to enjoin the competition.

Viewed in these terms, it is clear that the "assurances" of a protected exclusive that Penney received in the case were supplied by the *J.C. Penney* court rather than by the landlord. This was accomplished through the court's creative interpretation of the 1962 lease to contain the authorization for the 1978 extension and its attribution of notice of that creative interpretation to Giant Eagle. The fact remains, however, that the 1962 lease did not by its terms give

141. *J.C. Penney*, 85 F.3d at 130 (Stapleton, J., dissenting). For the author's critique of the majority's interpretation of the renewal clause, see *infra* note 144 and accompanying text.

142. *J.C. Penney*, 85 F.3d at 131 n.2 (Stapleton, J., dissenting).

143. *Id.* at 122. The exclusive provision in the 1978 lease explicitly stated: "rights similar to the rights herein granted by Landlord to Tenant are not held by any other tenant or occupant of space within there Entire Premises." *Id.* at n.2.

Penney an option—an enforceable right—to extend the lease beyond 1993.¹⁴⁴ The court's repeated observation that nothing in the 1962 lease *prohibited* the landlord and Penney from negotiating further renewals after 1993 confuses right and privilege. A tenant's right to renew a lease is not a default rule which applies unless it is negated by the terms of the parties' bargain, which is the framework that would have made the court's observations relevant. Rather, the opposite is true: in the absence of a renewal clause, a term lease expires when the term ends.¹⁴⁵ The tenant has no right to demand a renewal, although of course the parties remain free—this would seem to be a truism—to negotiate a new lease if both desire to do so, as the landlord and Penney did in 1978.¹⁴⁶

The fact that the court's holding bound Giant Eagle to a restriction that did not appear from the face of the record prompted a dissent by Judge Stapleton. At the time that Giant Eagle entered into its lease in 1977, the recorded thirty year Penney lease had half of its time remaining.¹⁴⁷ In 1993, Giant Eagle would have had 24 years remaining on its lease.¹⁴⁸ For Judge Stapleton, the court's holding "necessarily implies that Giant Eagle had no right to expect, in 1977, that it could operate a pharmacy after 1993 for the remaining 24 years of its lease."¹⁴⁹ Judge Stapleton thought that

144. *J.C. Penney Co. v. Giant Eagle, Inc.*, 813 F. Supp. 360, 363 (W.D. Pa. 1992), *aff'd*, 995 F.2d 217 (3d Cir. 1993). The 1962 Penney lease provided for three renewals in the tenant, and further provided that the landlord would not lease to a competitor "during the term of this lease, or any renewal or extension thereof." *Id.* Reading the lease provisions together, it would seem that the reference to renewals in the noncompetition promise meant the three renewals specifically provided for in the lease. *Id.* The Third Circuit detached it from that reference and read it to be a general authorization for renewals beyond the three specifically provided. *Id.* That interpretation is novel and runs afoul of the well-established proposition that perpetual renewals are not favored. *Id.* "When the language is general or vague as to the number of renewals or extensions, even when they are referred to in the plural, courts usually allow the tenant to have only one." CUNNINGHAM ET AL., *supra* note 65, § 6.63, at 382; *see also* ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 9:2 (1980) (stating perpetual renewals not favored, and clear language admitting of no doubt is required to create such right).

145. 1 AMERICAN LAW OF PROPERTY § 2:9 (A.J. Casner ed., 1952); SCHOSHINSKI, *supra* note 144, at § 3.28. Standard textbook discussions of the tenant's right to renew deal entirely with the interpretation of express renewal options rather than implied ones. *See* CUNNINGHAM ET AL., *supra* note 65, § 6.62-64, at 383 (discussing express renewal options); SCHOSHINSKI, *supra* note 144, §§ 9:1-7 (same).

146. *J.C. Penney*, 85 F.3d at 122.

147. *Id.* at 130 (Stapleton, J., dissenting).

148. *Id.* (Stapleton, J., dissenting).

149. *Id.* (Stapleton, J., dissenting).

holding to be incorrect, inasmuch as it would operate "retroactively to restrict a tenant's property rights under its lease agreement."¹⁵⁰

Judge Stapleton's dissent highlights an important value underlying recording statutes. For Judge Stapleton, the corollary of the burden that a purchaser with notice bears to honor a recorded lease encumbrance on the purchased property is the right "to hold the property free of the leasehold interest after the final expiration date indicated in the recorded lease agreement."¹⁵¹ A purchaser's ability to rely on the scope of encumbrances disclosed by the record would, of course, be an important factor in making the decision to invest in the property. Judge Stapleton could find "no principled difference" between binding Giant Eagle to Penney's post-1977 extension of its pharmacy exclusive and binding Giant Eagle to the terms of an unrecorded lease.¹⁵² Either way, Giant Eagle's property rights were more restricted than they were disclosed to be by the record in 1977.¹⁵³

In support of Judge Stapleton's argument, it is interesting to note that the majority in *J.C. Penney*, while relying heavily on Milton Friedman's treatise for the proposition that a tenant is bound by the "proper interpretation" of a prior tenant's recorded lease, nevertheless ignored a companion proposition, from the same section of that treatise, that a tenant is "not chargeable with notice of terms added in a renewal of the prior lease, where the renewal is made after his lease."¹⁵⁴ This latter proposition, no doubt based on the policy identified by Judge Stapleton of protecting the expectations of a subsequent tenant, seems to fit the situation in the *J.C. Penney* case. The 1978 extension of the exclusive right beyond its original term was just such an added provision.

Despite the tenor of the preceding observations, the observation being made here is not that the majority was necessarily wrong to burden Giant Eagle with notice of the contents of Penney's sub-

150. *Id.* (Stapleton, J., dissenting). Judge Stapleton was willing to assume for purposes of argument that Penney's 1962 lease survived the 1978 modification agreement, and that Giant Eagle had constructive notice of the terms of the 1962 lease. He dissented on the second issue, "whether J.C. Penney's 1978 lease could operate as an extension of the restrictive covenant in the 1962 lease beyond its original maximum term of 30 years." *Id.* (Stapleton, J., dissenting).

151. *Id.* (Stapleton, J., dissenting).

152. *Id.* (Stapleton, J., dissenting).

153. *Id.* (Stapleton, J., dissenting).

154. 3 MILTON R. FRIEDMAN, *FRIEDMAN ON LEASES* § 28.601 (3d ed. 1990). The proposition was before the court, as it was cited in Giant Eagle's brief. Appellant's Brief at 20, *J.C. Penney Co. v. Giant Eagle, Inc.*, 85 F.3d 120 (3d Cir. 1996) (No. 95-3054).

sequently-created lease. Rather, the suggestion is that the majority's holding, though novel, is supportable, if it is limited along the lines suggested by the dissent's concerns with the rights of a subsequent purchaser to rely on the record. The need for some limit on the decision is apparent. Economic interdependency is no doubt a fact of life in every shopping center. If that fact alone justifies the holding in *J.C. Penney*, the implication is that every tenant will be charged with divining the proper meaning of every other lease in the shopping center whose subsequent modification could affect the tenant. It is difficult to see how such a burden could have been intended by the court or in any event satisfied by the tenants subject to it.

To show the limits of the majority's holding, it is useful to consider two hypotheticals. First, if the renewal agreement extending Penney's pharmacy exclusive had occurred in 1990 instead of 1978 (or if the renewal had occurred in 1978, but Giant Eagle's entry into Quaker Village had occurred considerably earlier, in 1965), it is submitted that the majority's holding binding Giant Eagle to the terms of the extension would be unsupportable. Because the terms of the 1962 lease did not give Giant Eagle notice that Penney had a *right* to burden the landlord's property beyond 1993, the only basis for such an inference by Giant Eagle was the circumstances surrounding the 1978 Penney transaction. But the only basis in the case on which Giant Eagle could be charged with notice of Penney's 1978 negotiations is that Giant Eagle's own negotiations substantially overlapped with the Penney negotiations.¹⁵⁵ As Penney insisted throughout its negotiations on keeping and extending its exclusive and the Penney lease indicated that Giant Eagle's presence as a *supermarket* was vital to Penney,¹⁵⁶ it is perhaps not unfair to charge Giant Eagle, during its overlapping negotiations with the landlord, with a duty to inquire of both the landlord and Penney as to the scope of rights being contemplated in the transaction that culminated in the 1978 lease.

The second hypothetical changes the relevant parties rather than the relevant dates. Suppose that Giant Eagle assigned its lease to another supermarket and that the assignee sought to open a pharmacy in 1993. If the remarks on the first hypothetical are correct, it would be equally impermissible in this second hypothetical

155. *J.C. Penney*, 85 F.3d at 122, 126.

156. *See id.* (noting that 1978 lease "covenanted that Giant Eagle was to operate a supermarket in the shopping center, which was a condition for Penney's operating its new drugstore").

to charge the assignee supermarket with notice of Penney's exclusive right to operate a pharmacy beyond 1993. The assignee would have had no more basis for finding that right in the 1962 lease than Giant Eagle had, nor would the assignee have been privy, as Giant Eagle was, to the negotiations leading up to the 1978 Penney lease.

What the court in *J.C. Penney* has done is to use contract law, with its emphasis on intent effectuation, to make a novel and important extension in the shopping center context of the traditional property concept of inquiry notice. That concept usually denotes facts suggesting the existence of a restriction which, if pursued, would lead to actual confirmation of the restriction. A buyer who walks the boundaries of Blackacre and sees a manhole cover and a slight depression in the ground indicating the existence of a sewer-line easement may be charged with notice of the existence of the easement, even if the buyer never checks the recording office for the easement document.¹⁵⁷ In the case of a recorded easement, inquiry notice would often duplicate record notice, but it can have independent significance if the easement is outside of the buyer's chain of title to the servient estate and the jurisdiction limits record searches to chain of title.¹⁵⁸ Inquiry notice is also sometimes used to burden the servient estate purchaser with a restriction that is not on record, such as an implied easement. Although this may be justified on the basis that an affirmative easement is discoverable by a reasonable physical inspection of the servient property, some decisions finding notice go to extreme lengths to protect the beneficiary of the easement.¹⁵⁹ Finally, sometimes the buyer of the servient property is charged with notice of a *negative* easement, which, un-

157. *Cf. Sievers v. Flynn*, 204 S.W.2d 364 (Ky. 1947) (addressing inquiry notice of implied sewer-line easement).

158. CUNNINGHAM ET AL., *supra* note 65, § 8.28, at 492-93. If *O* conveys Blackacre to *A*, reserving a right-of-way easement across Blackacre, the easement is in the direct chain of title to the property; a title searcher will find the easement in the same deed that transfers fee title in Blackacre to *A*. Suppose instead that the deed to *A* is unrestricted, but *A* subsequently grants a right-of-way easement to her neighbor *B*. The easement is now in a deed outside of the direct chain of title; a title searcher would not find it in the fee deed from *O* to *A*. Some states charge a purchaser with constructive notice only of the contents of deeds in the direct chain of title; other states charge the purchaser with notice of deeds out of the direct chain. *See id.* (discussing notice of deeds in and out of direct chain of title). Pennsylvania is a "deeds out" jurisdiction. *See Finley v. Glenn*, 154 A. 299, 301-02 (Pa. 1931) (holding purchaser to knowledge of deeds out of direct chain).

159. *See Van Sandt v. Royster*, 83 P.2d 698, 702-03 (Kan. 1938) (finding buyer's notice of sewer-line easement based on buyer's notice of plumbing facilities which connected to sewer-line). *But see Wolek v. Di Feo*, 159 A.2d 127, 130-31 (N.J. Super. Ct. App. Div. 1960) (failing to charge purchaser with notice of underground sewer-line).

like an affirmative easement, leaves no physical trace on the servient estate.¹⁶⁰ In this last case, inquiry notice sometimes amounts to notice of the doctrine which creates the rights in the beneficiary, rather than notice of facts that could lead to discovery of a pre-existing right.¹⁶¹ This latter type of notice is very close to the kind of notice that Giant Eagle is charged with in *J.C. Penney*: notice that a court might recognize the existence of Penney's right to extend its earlier lease and retroactively bind a prior tenant to that extension.¹⁶² The underlying basis of the decision is perhaps fairness rather than intent effectuation. Because the interdependency of tenants in a shopping center is an important economic reality, the fact that such interdependency would have been undermined by Giant Eagle's competition and that Giant Eagle received reciprocal benefits from participation in the shopping center justifies the Third Circuit's decision charging Giant Eagle with notice, within the limits suggested above.

3. *Giant Eagle's Notice as a "Purchaser" of the 1962 Lease*

The court's holding that Giant Eagle was a "purchaser" charged with constructive notice of the terms of the 1962 lease as a result of recordation of a memorandum of the lease is unobjection-

160. See, e.g., *Sanborn v. McLean*, 206 N.W.2d 496 (Mich. 1925) (discussing notice of negative easements).

161. See *id.* (involving notice of negative easements). In *Sanborn*, a developer sold twenty-one lots by deeds restricting each purchaser to a residential use of the property, then sold a lot to defendant's predecessor without a restriction. *Id.* at 497. In a suit by a former purchaser against defendant, the court held that an implied "reciprocal negative easement" burdening the developer's retained lots was created by the developer's first sale and that defendant was charged with notice of the existence of that easement. *Id.* The court stated that the uniform residential character of the neighborhood put defendant on inquiry and had he checked, "he would have found of record the reason for such general conformation." *Id.* at 498. A search of the record, however, would only have disclosed that other lots were subject to restrictions; there was no express restriction on defendant's lot. *Id.* at 497. The *Sanborn* decision on notice is widely regarded as unusual. See CUNNINGHAM ET AL., *supra* note 65, § 8.28, at 493 (noting *Sanborn* is "perhaps extreme" extension of concept of inquiry notice). It is not, however, unjustified: without the implied reciprocal easement and notice, defendant would have been able to frustrate the developer's plan for common residential development of the subdivision, to the detriment of other purchasers who had relied on such uniform residential development. The *Sanborn* decision creates the enforcement mechanism—an implied reciprocal easement and a generous construction of inquiry notice—that the developer failed to expressly provide. A landlord who intends to control development of a shopping center and a developer who intends to develop a common residential subdivision are in much the same position; the parallels between the justification for binding the defendant in *Sanborn* and binding Giant Eagle in *J.C. Penney* are apparent.

162. See *J.C. Penney v. Giant Eagle, Inc.*, 85 F.3d 120, 127-28 (3d Cir. 1996) (charging Giant Eagle with notice).

able in result, although the holding prompts discussion.¹⁶³ First, the court did not have to conclude that the Pennsylvania Supreme Court has committed itself to the proposition that a lease is a sale—a “purchase”—in order to conclude that Giant Eagle was bound by the recording of the 1962 lease.¹⁶⁴ In property law, a purchaser is anyone who takes an interest in real property pursuant to an instrument of transfer (i.e., a deed, will or lease) as opposed to an inheritance.¹⁶⁵ This, for example, is the sense in which the term is used in distinguishing words of purchase in a transfer (indicating who takes an interest) from words of limitation (indicating the extent of the interest taken).¹⁶⁶ In this property view of the meaning of “purchaser,” the distinction between lease and sale is immaterial. Tenants and buyers are both purchasers. Although this is not the place to address the question, there is undoubtedly an entire scholarly article to be written about the consequences—both good and bad—of the characterization of a lease as a sale of the property for the term of the lease as an analytical basis for resolving disputes between the landlord and tenant.¹⁶⁷ It was unnecessary for the *J.C. Penney* court to enter into the knotty question of the character of a lease as a sale of the property, both because a tenant is a “purchaser” in a relevant property sense even if a lease is not treated as a sale, and because *Monumental Properties*, on which the court relied, is far from the last word on the subject from the Pennsylvania Supreme Court.¹⁶⁸

163. *Id.* at 128-29.

164. *See id.* (finding Giant Eagle was bound by recording of 1962 lease).

165. *See* CURTIS J. BERGER, LAND OWNERSHIP AND USE 146 (3d ed. 1983) (defining “purchase” as “any transfer of a property interest that is accomplished by a conveyance or a will”).

166. *See, e.g.,* BERGER, *supra* note 165, at 146 (noting “purchase” is “any transfer of a property interest that is accomplished by a conveyance or a will”); JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 208 (3d ed. 1993) (distinguishing between words of purchase and words of limitation in context of creation of fee simple).

167. *Compare* Gibson v. Perry, 29 Mo. 245, 246-47 (1860) (holding tenant obligated to pay rent after destruction by fire of building on leased premises; also finding lease is sale, with risk of loss on buyer after delivery), *with* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1081 (D.C. Cir. 1970) (finding residential tenant similarly situated to consumer, entitled to implied warranty of habitability akin to implied warranty of merchantability in sale of goods).

168. *See* Albert M. Greenfield & Co. v. Kolea, 380 A.2d 758, 759-60 (Pa. 1977) (applying frustration of purpose doctrine to excuse commercial tenant from rent obligation after destruction of building on leased premises). If the sales analogy were to be followed, risk of loss would be on the tenant either at the point of delivery of possession under the analogy to the sale of goods, or perhaps even from the time of execution of the lease if that precedes the beginning of the term, under the analogy to sales of land. *See* U.C.C. § 2-509(3) (1978) (stating generally that “the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant”); DUKEMINIER & KRIER, *supra* note 166, at 604-05 (noting doctrine of

The second observation is that there is more than a hint of irony in the court's use of the sales analogy to define the meaning of "purchaser" under the recording statute.¹⁶⁹ The *J.C. Penney* majority vigorously embraced the contract characterization of leases as a standard for resolving noncompetition covenant issues, and it vigorously applied that characterization to bind Giant Eagle to the "proper interpretation" of the true meaning of the 1962 Penney lease.¹⁷⁰ That being done, the court in its last holding imported property law back into the analysis by defining a "purchaser" under the recording statute as a buyer, since a sale is simply a contract which transfers ownership rights from one party to another. The use of some notion of ownership to define the meaning of terms in the recording statute is unavoidable. The point is simply that the necessity of looking to the concept of "ownership"—i.e., looking to property law—on *some* issues involving leases must always be an embarrassment to those theorists, like the majority on the *J.C. Penney* court, who apparently seek to subsume the lease entirely under contract law.¹⁷¹

4. *Restrictions on Pharmacy Use in Giant Eagle's Own Lease*

The court's suggestion that Giant Eagle's operation of a pharmacy could be prohibited on the independent ground that it was

"equitable conversion," under which buyer has equitable interest upon execution of contract of sale, sometimes used to allocate risk of loss to buyer for injury to property occurring between contract of sale and conveyance of title). *Kolea* is a leading case dispensing with the sales analogy and applying frustration of purpose when the premises are destroyed by casualty. *Kolea*, 380 A.2d 760.

169. See *J.C. Penney*, 85 F.3d at 128-29 (discussing analogy to sales). The *J.C. Penney* court found that the most reasonable interpretation of the Pennsylvania recording statute led to the conclusion that the legislature intended the term "purchaser," as used in the statute to include lessees. *Id.* The court also noted that the Supreme Court of Pennsylvania has held the lease of property to be a "sale." *Id.*; see *Commonwealth v. Monumental Properties, Inc.*, 329 A.2d 812 (Pa. 1974) (holding lease of real property is "sale" under Pennsylvania Consumer Protection Law).

170. *J.C. Penney*, 85 F.3d at 126. The court stated:

Both of Giant Eagle's arguments against extension of Penney's 1962 exclusive right ignore Pennsylvania law which requires us to realistically interpret shopping center leases in light of the intent of the parties under contract principles. . . . The [Pennsylvania Supreme Court] in *Teodori* decided that courts should realistically interpret shopping center leases under contract-law principles, rather than traditional property law, to give effect to the economic realities at work in shopping centers.

Id. (citation omitted).

171. See generally Edward Chase & E. Hunter Taylor, Jr., *Landlord and Tenant: A Study in Property and Contract*, 30 VILL. L. REV. 571 (1985) (discussing impact of property-contract theme on tenants' rights and obligations under lease); John A. Humbach, *The Common-Law Conception of Leasing: Mitigation, Habitability, and Dependence of Covenants*, 60 WASH. U. L.Q. 1213 (1983) (same).

an unauthorized use under Giant Eagle's own lease, rather than prohibited because of inconsistency with a prior superior right granted to Penney, is unwise, for the same reason that the court's easement discussion was unwise: it suggests intent effectuation as a general solution to complex issues that deserve close study if and when they arise.¹⁷² More specifically, the court's suggestion of an implied restriction on Giant Eagle's use of its premises, based on the parties' intent, raises two problems.¹⁷³

First, the suggestion extends the court's rejection of strict construction and its use of intent effectuation methodology from the area of noncompetition covenants into the area of restrictions on the tenant's use of the leased property, without taking account of the unique character of noncompetition covenants. A noncompetition covenant could be objectionable and subject to a rule of strict construction because it is a restriction on land use, because it restrains competition or both.¹⁷⁴ The anti-competitive concern—that the covenant creates a monopoly in the beneficiary—seems to be the more important concern underlying the rule of strict construction. For one thing, noncompetition covenants outside of the land use area (for example an employee's promise not to compete with an employer after termination of employment) are sometimes subject to a rule of strict construction, indicating that negative impact on land use is not the driving force behind the narrow reading of such covenants.¹⁷⁵ Additionally, if the Pennsylvania Supreme Court recognizes that noncompetition covenants respecting land use produce important benefits to counter their disadvantages, it would not make much sense, having answered the specific anti-competitive objection, to independently subject those covenants to the general rule of strict construction applicable to restrictions on land use.¹⁷⁶ In short, while rejection of the rule of strict construction for

172. See *J.C. Penney*, 85 F.3d at 127-28 (suggesting operation of pharmacy was prohibited on ground it was unauthorized).

173. See *id.* (discussing restriction on use of premises based on intent of parties).

174. See CUNNINGHAM ET AL., *supra* note 65, § 6.26, at 279 (discussing reasons for narrow reading and stating "that restrictive covenants are often said to be so read and also that the covenant restrains competition").

175. See 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 5.3, at 16-26 (1990) (discussing restrictive employment covenants in connection with policy against restraint of trade); *id.* § 7.11, at 268 (stating rule that construction favoring public interest should be followed supports rule of strict construction of noncompetition covenants).

176. See *Teodori v. Werner*, 415 A.2d 31, 34 (Pa. 1980) (stating "[i]t is obvious that a landlord's non-competition promise is critical to a commercial lease agreement The mere presence in a lease of a noncompetition promise by the

noncompetition covenants in favor of intent effectuation may be perfectly proper, that rejection has no necessary implication for the general rule of strict construction applicable to restrictions on land use. It is the general rule against restrictions on land use that protects a tenant, like Giant Eagle, from the finding of implied restrictions on use; "because the law does not favor burdens on land . . . courts are wont to limit the scope of the restrictions by a strict or literal reading."¹⁷⁷ The suggestion here is that it is a mistake to read *Teodori* to mandate any changes in the law of interpretation relating to covenants that purport to limit the tenant's use, as opposed to noncompetition covenants that limit the landlord's freedom to lease to a competitor.

A second reason for avoiding a conclusion that Giant Eagle's own lease prohibited competition with Penney is that, on facts like those presented in the case, such a conclusion raises an important issue of standing to enforce the restriction, whose resolution is far from clear under the Pennsylvania Supreme Court's decisions.¹⁷⁸ If the 1977 lease contained a restriction on Giant Eagle's use, as implied from the circumstances, the promisee of that restriction would have been the landlord. Any subsequent tenant of the landlord could claim the benefit of that restriction, but a prior tenant could not; covenant benefits do not run backwards any more than covenant burdens do.¹⁷⁹ A prior tenant could invoke the restriction on Giant Eagle's use only as the third party beneficiary of Giant Eagle's implied promise made to the landlord.¹⁸⁰

Penney, if it claimed to be a predecessor under its 1962 lease for purposes of enforcing its exclusive right against Giant Eagle, could hardly claim to be a successor to Giant Eagle under the 1978 lease for purposes of asserting the benefit of any restriction in Giant

landlord justifies the conclusion that it is essential that the promise be observed if the tenant is to conduct his business on the lease property profitably." (quoting RESTATEMENT (SECOND) OF PROPERTY § 7.2 cmt. b (1977))).

177. CUNNINGHAM ET AL., *supra* note 65, § 6.24, at 277; see *Turman v. Safeway Stores*, 317 P.2d 302, 306-07 (Mo. 1957) (noting fact that lease provided for tenant's use of premises as retail food store and that evidence showed parties contemplated such use did not raise implied agreement by tenant not to use premises for other purposes).

178. For a discussion of the facts of *J.C. Penney*, see *supra* notes 14-30 and accompanying text.

179. See RESTATEMENT OF PROPERTY § 542(1) (1944) (stating person other than promisee may acquire right to enforce promise "by succession to the land of one initially entitled to the benefit of the promise").

180. *Id.* § 541 (stating persons initially entitled to enforce promise are promisee "and such third persons as are also beneficiaries of the promise").

Eagle's own lease.¹⁸¹ Penney's right to enforce the implied restriction in Giant Eagle's lease would require that Penney employ third-party beneficiary theory. It is not clear whether that argument would be successful under the Pennsylvania cases.¹⁸² The dissent in *J.C. Penney* apparently thought that it would not be successful.¹⁸³ Nor is it necessary here to seek to resolve the issue. The point is simply that the *J.C. Penney* court's use of intent theory to suggest a limit on the uses authorized by Giant Eagle's own lease raises difficult problems that could best be left for another day and another case.¹⁸⁴

B. *The Meaning and Existence of Noncompetition Promises*

Sometimes disputes about noncompetition covenants center on the meaning of the language used in an express covenant. Other times disputes center on the existence of the covenant if one is not expressed in the language of the written lease. The kind of vigorous intent effectuation approach expressed by the court in *J.C. Penney* has implications for both kinds of questions.

1. *The Meaning of Noncompetition Promises*

The widely-cited case of *Great Atlantic & Pacific Tea Co. v. Bailey*,¹⁸⁵ a Pennsylvania Supreme Court case relied on by the *J.C. Penney* court, offers interesting facts for the purpose of comparing the use of strict interpretation and intent effectuation approaches when

181. See *J.C. Penney v. Great Eagle, Inc.*, 85 F.3d 120, 127-28 (3d Cir. 1996) (discussing arguments of Penney regarding 1962 lease).

182. Compare *Spires v. Hanover Fire Ins. Co.*, 70 A.2d 828 (Pa. 1950) (plurality opinion), *overruled by* *Guy v. Liederbach*, 459 A.2d 828 (Pa. 1983) (adopting restrictive test, requiring that both contracting parties intend that third-party be beneficiary and that such intent affirmatively appear from contract itself), with *Scarpitti v. Weborg*, 609 A.2d 147, 150 (Pa. 1992) (noting *Spires* still law on issue of determining who has standing as third-party beneficiary and that *Spires* rule subject to exception where "the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and . . . the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance"). Because the emphasis in *Scarpitti* is on intent-effectuation, it may be that a generous view of third party beneficiary theory would be applied to prior tenants in a shopping center. The dissent in *J.C. Penney*, however, cited *Scarpitti* for the conclusion that Penney would not qualify as a third-party beneficiary. *J.C. Penney*, 85 F.3d at 131. At the very least, the current state of the law in Pennsylvania is difficult to predict: *Spires* is a plurality opinion, *Scarpitti* states an exception without overruling *Spires* and three judges in *Scarpitti* concurred in the result only, unfortunately without opinion.

183. *J.C. Penney*, 85 F.3d at 131 n.2 (Stapleton, J., dissenting).

184. For a discussion of the *J.C. Penney* court's use of intent theory, see *supra* notes 60-127 and accompanying text.

185. 220 A.2d 1 (Pa. 1966).

evaluating the meaning of noncompetition covenants. In *Great Atlantic & Pacific Tea Co.*, the landlord owned a tract of land divided by a highway into north and south parcels.¹⁸⁶ The landlord leased a portion of the north parcel to A & P and promised not to lease to a competitor of A & P "on the adjacent property owned by the Lessors during the term of this lease or the renewals herein granted."¹⁸⁷ Subsequently, the landlord acquired an additional piece of land abutting the north parcel and leased a portion of that after-acquired parcel to Super Duper, Inc. to be used for the erection and operation of a supermarket.¹⁸⁸ The issue facing the court was whether the Super Duper parcel was covered by the prohibition against the landlord's leasing to a competitor on "adjacent" property of the landlord owned during the term of the lease.¹⁸⁹ The Pennsylvania Supreme Court held that it was excluded.¹⁹⁰

The plurality opinion relied on the rule of strict construction of noncompetition covenants, and from that rule it derived two subsidiary rules.¹⁹¹ First, the court noted that the rule of strict construction of land use restrictions meant that "nothing will be deemed a violation of such a restriction that is not in plain disregard of its express words."¹⁹² This rule required A & P to point to language which expressly, rather than by implication, extended the covenant to after-acquired land. In response, A & P apparently argued that the disputed covenant, while it did not use the very words "after-acquired property," nevertheless lent itself to "no other construction but that after-acquired lands were intended to be included."¹⁹³ Super Duper's competing market was located on property "adjacent" to the original north parcel of the landlord's tract, and even though that adjacent property was acquired after the lease to A & P, it was nevertheless "owned by the Lessors during the term of this lease or the renewals herein granted."¹⁹⁴

The plurality opinion, however, noted that A & P's reading revealed an ambiguity in the disputed clause.¹⁹⁵ It could have referred solely to the landlord's original adjacent parcel to the south

186. *Id.*

187. *Id.* at 2.

188. *Id.*

189. *Id.* at 3.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

of the bisecting highway, or it could have referred more broadly to that parcel and the subsequently-acquired Super Duper parcel.¹⁹⁶ The second subsidiary rule that the plurality extracted from the rule of strict construction was that ambiguities must be construed against the party claiming the benefit of the restriction.¹⁹⁷ The full clause stated that the landlord agreed that "no other supermarket . . . will be permitted to occupy space on the adjacent property owned by the Lessors during the term of this lease or the renewals herein granted."¹⁹⁸ Under the landlord's construction, the promise was that "no other supermarket will be permitted during the term of this lease or the renewals herein granted to occupy space on the adjacent property owned by the Lessors."¹⁹⁹ Under that version of the sentence, the phrase "adjacent property owned by the Lessors" can much more clearly be read to refer only to the south parcel, particularly because the language specified a restriction on "the" adjacent property, not "any" adjacent property.²⁰⁰ Because the parties could have settled on a shorter duration for that restriction than the full term of the lease, the quoted phrase could easily have referred to the duration of the restriction, rather than the extent of the property subject to the restriction. It did not necessarily have to apply to after-acquired property as argued by A & P.²⁰¹

Justice Roberts, dissenting, argued that the court's role was to ascertain the parties' intended meaning, taking guidance from all relevant facts and circumstances that could shed light on that meaning.²⁰² Justice Roberts isolated two factors of particular importance to the case at hand. First, in contrast to the plurality's exclusive focus on the language of the restriction, he argued that the language must be read in light of the parties' purposes sought

196. *See id.* (discussing layout of landlord's property).

197. *Id.*

198. *Id.* at 2.

199. *Id.* at 3.

200. *Id.* at 2. In *Cragmere Holding Corp. v. Socony-Mobil Oil Co.*, 167 A.2d 825 (N.J. Super. Ct. App. Div. 1961), the landlord's promise was that "no real property located on the westerly side of Route 17 and located within one thousand (1,000) feet of the premises . . . and owned or leased by Lessor" shall be used in competition with the tenant. *Id.* at 826. Emphasizing intent effectuation and the tenant's purpose, the court held that the promise covered after-acquired property on the west side of the highway. *Id.* However, the absolute language "no real property," itself seems to justify that construction and to distinguish *Great Atlantic & Pacific Tea Co.*

201. *See Great Atl. & Pac. Tea Co.*, 220 A.2d at 3 (noting after-acquired property argument of A & P).

202. *Id.* at 5-8 (Roberts, J., dissenting).

to be achieved by the language.²⁰³ "A & P sought assurance that its expenditures in moving into and promoting a new and untried market area would not be jeopardized by competition from another lessee of defendant-appellees."²⁰⁴ Because competition emanating from an after-acquired parcel adjacent to the original shopping center could be as ruinous to A & P as competition stemming from a source within the original boundaries of the center, Justice Roberts found no difficulty in concluding that the parties' purpose would be defeated if the Super Duper parcel was excluded from the reach of the covenant.²⁰⁵

Justice Roberts buttressed his analysis of the parties' purpose with a consideration of the circumstances surrounding the execution of the lease. Justice Roberts noted that A & P abandoned an "established location" in nearby Meadville, expended "large sums of money" to enter and promote this "untried market area," and was the sole commercial tenant of the fledgling shopping center for the first two years of its lease.²⁰⁶ Moreover, although there were no definite and precise plans at the time of A & P's lease, Justice Roberts noted that both parties to the lease contemplated the future development of the site as a shopping center.²⁰⁷ Justice Roberts's focus on the substantial expenditures made by A & P suggests the possibility of uncompensated reliance—a partial forfeiture—if the disputed clause was not construed broadly to cover after-acquired property.²⁰⁸ That A & P was the only tenant for two years is a factor in which fairness and intent effectuation blend together. A & P did the initial difficult work of getting the shopping center off the

203. *Id.* at 6 (Roberts, J., dissenting); see also RESTATEMENT (SECOND) OF CONTRACTS § 202(1) (1981) (stating words and conduct "are interpreted in light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight"). Under the approach of the revised Restatement, the goal of interpretation in cases of misunderstanding such as *Great Atlantic & Pacific Tea Co.*, would be determined by whether on the basis of the evidence explored by Justice Roberts, the landlord knew or should have known of A & P's intended meaning, according to the evidence explored by Justice Roberts. See RESTATEMENT (SECOND) OF CONTRACTS §§ 20-21 (1981) (dealing with question of whose meaning prevails in cases of misunderstanding).

204. *Great Atl. & Pac. Tea Co.*, 220 A.2d at 6; see 2 FARNSWORTH, *supra* note 175, § 7.10, at 258 (stating "[i]t seems proper to regard one party's assent to the agreement with knowledge of the other party's general purposes as a ground for resolving doubts in favor of a meaning that will further those ends, rather than a meaning that will frustrate them").

205. *Great Atl. & Pac. Tea Co.*, 220 A.2d at 8-9 (Roberts, J., dissenting).

206. *Id.* at 7 (Roberts, J., dissenting).

207. *Id.* (Roberts, J., dissenting).

208. *Id.*; cf. 2 FARNSWORTH, *supra* note 175, § 8.4, at 362-73 (stating preference for avoiding forfeiture is important factor in courts' construction of ambiguous conditions in contracts).

ground and in return was entitled to the kind of reciprocal fairness that would extend the covenant to after-acquired property.²⁰⁹ These circumstances suggested to Justice Roberts that A & P sought and expected, in return for the substantial commitments it made in entering into the lease and promoting the new shopping center, the largest possible assurance against competition as the site developed in the future, consistent with the language of the covenant.²¹⁰ Further, given the uncertainties about the pace and direction of the contemplated future development, Justice Roberts found it perfectly natural that the parties' overriding concern would be to respond to A & P's basic need for assurances about competition, rather than to worry about the "precise status of land ownership" (i.e., to phrase themselves in terms of "after-acquired" property).²¹¹

On the question of choosing the method for interpreting a landlord's noncompetition promise, the approach of intent effectuation, as chosen by the Third Circuit in *J.C. Penney* and advocated by Justice Roberts, seems clearly preferable to the rule of strict construction adopted by the plurality opinion for two reasons. First, with reference to the specific type of land use restriction involved—a noncompetition covenant—the rule of strict construction is unnecessary. The policy concern underlying such covenants is the anti-competitive effects of the restriction: the beneficiary of the restriction gets a monopoly in the territory covered by the location, depriving customers of whatever price and service advantages might result from competition by another enterprise. A rule of strict construction reduces the harm of a noncompetition covenant by restricting the situations to which the covenant applies. The modern trend in noncompetition analysis, however, is to recognize that noncompetition covenants produce compensating advantages. Indeed, the advantage of noncompetition covenants in implementing the controlled development of a shopping center and guaranteeing the observance of the "interrelationship" of mutual dependency and benefit among tenants was a centerpiece of the court's analysis in *J.C. Penney*.²¹² The modern tendency is to address directly the policy questions raised by noncompetition covenants by making the validity of the covenant depend on the reasonableness of the time

209. *Great Atl. & Pac. Tea Co.*, 220 A.2d at 7-8 (Roberts, J., dissenting).

210. *See id.* (Roberts, J., dissenting) (discussing A & P intent in lease).

211. *See id.* at 6 (Roberts, J., dissenting) (discussing intent of parties).

212. *See J.C. Penney v. Great Eagle, Inc.*, 85 F.3d 120, 127-28 (3d Cir. 1996) (discussing notion of interdependency).

and area covered.²¹³ When the time and area questions are addressed directly and answered in favor of the restriction, there is no longer a need for strict construction to serve as a proxy or "covert tool" for regulation of the covenant.²¹⁴ In *Great Atlantic & Pacific Tea Co.*, for example, the requirement that any property subject to the restriction be "adjacent" provided an inherent limit on the area in which the covenant would operate.²¹⁵ Because the policy concern about noncompetition covenants was answered by that limitation, there was no reason not to use intent analysis for whatever aid it could furnish on the question of just what parcel or parcels were intended to be covered.

A second reason for rejection of the approach of strict construction is that the approach can be used to produce results that frustrate any fair reading of the tenant's purpose in seeking the covenant. Two examples, briefly recounted, illustrate the point. In *Renee Cleaners, Inc. v. Good Deal Super Markets of N.J., Inc.*,²¹⁶ a landlord promised not to "lease" to a competitor of the tenant, who operated a dry cleaning establishment, within a specified radius of the tenant's premises, an area which included a parcel of land (Parcel B) owned by the landlord.²¹⁷ During the term of the tenant's lease, the landlord sold Parcel B to a buyer, who subsequently leased it to a competitor of the tenant, prompting the tenant's suit.²¹⁸ Reversing a judgment of the trial court, the appellate court rejected the "strictly literal interpretation" offered by the landlord and opted instead for the rule of intent effectuation.²¹⁹ The court focused on

213. See RESTATEMENT (SECOND) OF PROPERTY § 7.2, Reporter's Note 2, at 256 (1977) (stating "[t]he test [of validity] is stated in various ways: the promise is valid if it is ancillary to an otherwise lawful transaction and reasonable in time and area restricted").

214. See Karl Llewellyn, Book Review, 52 HARV. L. REV. 700, 703 (1939) (noting "[c]overt tools are never reliable tools"). An analogy to this use of strict construction as an indirect way of addressing questions of the validity of a restriction is the use of strict construction of exculpatory clauses in leases to limit their impact rather than use of an unconscionability analysis. See 2 FARNSWORTH, *supra* note 175, § 4.26, at 315-19 (discussing interpretation as judicial technique for mitigating harshness of unfair contract terms). See, e.g., *Galligan v. Arovitch*, 219 A.2d 463 (Pa. 1966) (finding tenant's recovery for injury occurring on lawn was not barred by exculpatory clause applicable to sidewalks, as "[a] lawn and a sidewalk are clearly different locations").

215. See *Great Atl. & Pac. Tea Co.*, 220 A.2d at 2 (noting requirement that any property subject to restriction be "adjacent").

216. 214 A.2d 437 (N.J. Super. Ct. App. Div. 1965).

217. *Id.* at 438.

218. *Id.*

219. *Id.* at 439-40. The *Renee Cleaners* court relied on its prior decision in *Cragmere Holding Corp. v. Socony-Mobil Oil Co.*, which held "[t]he [noncompetition] covenant in question must be construed in the light of both the circumstances

the purpose of the noncompetition covenant and on other provisions of the lease.²²⁰ Because the purpose of securing a competition-free environment for the tenant on Parcel B would have been defeated regardless of the form of transfer by the landlord (sale or lease), the court's decision may well have been correct even without reference to the other provisions of the lease. Nevertheless, the court also noted that the terms of the lease imposed a variety of restrictions on the tenant. The restrictions included limiting the tenant's use of the premises, dictating the hours of the tenant's operation and forbidding assignment or subleasing without the landlord's consent.²²¹ In light of the burdens imposed on the tenant by the lease, the court concluded that the tenant, in exchange for such burdens, bargained for and was entitled to not only the landlord's promise not to "lease" to a competitor, but to "freedom from competition" on Parcel B "to the extent that such protection could be provided by defendants."²²²

While the court in *Renee Cleaners* rejected the strict construction approach advocated by the landlord, the court in *Keyes v. Carrick*²²³ followed strict construction. In that case, the landlord leased one store in a five story building to a tenant operating a jewelry store.²²⁴ In the lease, the landlord promised not to lease any other portions of the building in which tenant operated a jewelry store "for any purpose inimical to the purpose herein granted lessees."²²⁵ Subsequently, the landlord refused two requests by the tenant of another store in the building for approval of assignments or subleases on the ground that the proposed replacement tenants contemplated the operation of a jewelry store in competition with the protected tenant.²²⁶ Ultimately, however, the landlord leased a store in the building to a competitor.²²⁷ The court concluded that the rule of strict construction applied to the covenant and deter-

under which it was written, and the purpose, express or implied, of the parties in effecting their arrangements, in order that we may attribute to their language a rational meaning consonant with that purpose." *Id.* at 440 (quoting *Cragmere Holding Corp. v. Socony-Mobil Oil Co.*, 167 A.2d 825, 826 (N.J. Super. Ct. App. Div. 1961)).

220. *Id.* at 442-43; see RESTATEMENT (SECOND) OF CONTRACTS § 202(1) (1981) (stating parties' purpose is given "great weight" in interpretation); *id.* at § 202(2) (stating writing is to be interpreted as a whole).

221. *Renee Cleaners*, 214 A.2d at 442.

222. *Id.*

223. 268 S.W.2d 397 (Ky. 1954).

224. *Id.* at 399.

225. *Id.*

226. *Id.*

227. *Id.* at 400.

mined that "inimical" meant "unfriendly, hostile, having the disposition of an enemy, antagonistic."²²⁸ The clause thus did not necessarily apply to competition, which "is generally regarded as a healthy component of our economy to be fostered rather than restrained."²²⁹ Instead, the clause applied to a business such as a "saloon or shooting gallery which would constitute a nuisance or unfriendly atmosphere in which to do business."²³⁰ Having opted for strict construction, the court did not have to explain why it rejected the more obvious economic protection against competition that the tenant was probably seeking in the admittedly inartful language, in favor of a construction that extended a perhaps redundant protection to the tenant, given the existence of the law of nuisance, and a perhaps unnecessary protection, given the disincentives that a landlord would have to introduce a saloon or shooting gallery into the limited number of spaces in its building. Furthermore, the court failed to offer a convincing explanation for its rejection of the course-of-performance evidence suggesting that the landlord's practical construction was that the clause did indeed protect the tenant against competition.²³¹ Three judges dissented, without opinion unfortunately, from the majority's construction of the word "inimical."²³²

These comments about *Renee Cleaners* and *Keyes* suggest that the approach of intent effectuation, which seeks the parties' meaning, is preferable to the rule of strict construction, which decrees a meaning to ambiguous language without reference to intent.²³³ It must also be said, however, that the intent effectuation method of analysis will not necessarily produce a result in favor of the tenant. *Great Atlantic & Pacific Tea Co. v. Bailey* makes an interesting comparison to *Renee Cleaners* and *Keyes* in this regard. First, in the latter two cases, much more clearly than in the former case, the basic purpose of the tenant in securing the noncompetition clause would have been defeated by the use of strict construction. In *Renee Clean-*

228. *Id.* at 402.

229. *Id.*

230. *Id.* at 399-402.

231. *Id.* at 402-03. The court noted that the landlord was not dealing with the tenant, but with third parties. *Id.* While course of performance evidence does not apply to the action of one party only, such action is at least "evidence against him that he had knowledge or reason to know of the other party's meaning." RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. g (1981).

232. *Keyes*, 268 S.W.2d at 402-03.

233. See 2 FARNSWORTH, *supra* note 175, § 7.11, at 265 (stating rules of construction "help to determine the legal effect of language quite independently of the meaning that the parties may have attached to it").

ers, for example, an interpretation forbidding the sale but allowing a lease to a competitor would have deprived the tenant of protection during the term of the lease on the very parcel specifically covered by the covenant. The same can be said of the court's interpretation of "inimical" in *Keyes*. In contrast, in *Great Atlantic & Pacific Tea Co.*, even under the minimum interpretation of "adjacent property" imposed by the rule of strict construction, A & P received protection during the entire term of the lease against competition on the balance of the north parcel retained by the landlord, as well as on the south parcel. While the dimensions of the landlord's overall tract are not specified in the opinion, a restriction of the protection to originally-owned adjacent property could well have been a significant protection, although of course, not as extensive a protection as A & P would have desired. Certainly it would have been relevant under an intent analysis to inquire into how much territory was covered by the covenant under its minimum construction, compared to the consideration which A & P furnished for the lease.

Second, there is in *Renee Cleaners*, much more clearly than in *Great Atlantic & Pacific Tea Co.*, an imbalance in the exchange between landlord and tenant by virtue of the lease provisions in *Renee Cleaners* restricting the use and transfer rights of the tenant. While courts do not inquire into the adequacy of consideration for formation of a contract, the imbalance certainly becomes a relevant factor in determining the parties' intent as between a narrower reading of the noncompetition covenant which preserves the imbalance and a broader one which helps to eliminate or soften it. Finally, while it is a fair inference that the tenants in *Renee Cleaners* and in *Keyes* were small business operators and probably unsophisticated (the terms of the leases suggest as much), it is also a fair inference that A & P would have had extensive experience in the business of leasing and a cadre of advisers to explain its intricacies.²³⁴ The playing field was much more level in *Great Atlantic & Pacific Tea Co.* than in the other two cases, and a construction against a corporate power that fails to insert the relevant language—"adjacent property owned now or hereafter"—is not implausible, even conceding the superiority of intent analysis.²³⁵

234. See *Rowe v. Great Atl. & Pac. Tea Co.*, 385 N.E.2d 566, 571 (N.Y. 1978) (stating "A & P is, of course, a national firm presumably represented by capable agents").

235. Cf. *id.* at 571-72 (stating "identity of parties to the agreement" is relevant in decision refusing to imply restriction on tenant's power to assign or sublease and noting tenant was "national firm presumably represented by capable agents")

2. *Implied Agreements, Oral Agreements, and Intent Analysis*

When a lease contains an express promise prohibiting competition, disputes frequently center on the meaning of the language, as in the cases just canvassed.²³⁶ In other cases, a tenant argues that a noncompetition covenant exists even though it is not stated in the lease. The argument is sometimes that a restriction should be implied on the basis of circumstances surrounding the execution of the lease. At other times, the argument is that the parties orally agreed on the restriction despite its omission from the writing. Both arguments are intent-based: the tenant claims an agreement manifested, respectively, in the circumstances of the transaction and in the express, albeit oral, agreement. Because the vigorous intent analysis adopted by the court in *J.C. Penney* could be taken to suggest answers to the issues involved in implying a covenant or implementing an oral one, it is worthwhile to take the present analysis a step further, however briefly.

The case of *Stockton Dry Goods v. Girsch*²³⁷ furnishes a useful example, because the tenant argued both for an implied noncompetition covenant and for an express oral one.²³⁸ In *Stockton Dry Goods*, the tenant's predecessor leased the only shoe department that existed in the landlord's store for 20 years.²³⁹ Subsequently, the tenant operated the shoe department.²⁴⁰ The landlord sought and won a declaratory judgment that it was entitled to lease to a competitor of the tenant.²⁴¹ The court rejected the tenant's claims of an oral noncompetition agreement between the parties as well as an agreement implied from the circumstance that for 20 years there had been only one shoe department in the store.²⁴²

On the claimed oral agreement, the court answered with the parol evidence rule.²⁴³ That rule excludes evidence of an oral contract term used to supplement or contradict a completely inte-

and landlord was "an experienced attorney and businessman knowledgeable in real estate transactions"); 2 FARNSWORTH, *supra* note 175, § 7.11, at 518 (noting fact that party is represented by lawyer in drafting process is sometimes used as basis for resolving ambiguity against that party).

236. For a further discussion of disputes arising over the express language in noncompetition clauses of real property leases, see *supra* notes 185-235 and accompanying text.

237. 227 P.2d 1 (Cal. 1951).

238. *Id.* at 2-3.

239. *Id.* at 2.

240. *Id.*

241. *Id.* at 2-4.

242. *Id.*

243. *Id.* at 2-3.

grated writing.²⁴⁴ It allows proof of a supplementary (i.e., consistent) term if the writing is partially integrated.²⁴⁵ Since the tenant's offered agreement was supplementary (the lease contained no disclaimer of a promise regarding competition), the court's exclusion of the evidence because it would "enlarge" the agreement is, in effect, a holding that the lease was completely integrated.²⁴⁶ With reference to the tenant's claimed implied-in-fact agreement, the court initially responded by stating that any implication must be grounded in the language of the transaction itself, rather than in the surrounding circumstances.²⁴⁷ The court found no language to support the tenant's claim.²⁴⁸ Additionally, however, the court noted that if circumstances were considered, they could suggest a conclusion opposite to that advanced by the tenant.²⁴⁹ It was "common knowledge that many stores have more than one department to supply similar lines of goods."²⁵⁰ Although the court did not say so, perhaps evidence of the difference between rentals for comparable shoe departments with a restriction and without, compared to the tenant's rentals, would have been relevant. The mere existence of a single department store for 20 years, standing alone, did not, however, sufficiently indicate that the parties intended to counteract the common practice.

Without pausing to question the holding of the *Stockton Dry Goods* case against the existence of the noncompetition covenant, it is useful to compare the court's approach with *J.C. Penney's* intent effectuation methodology. The court's argument in *Stockton Dry Goods* that implications must be based on language alone rather than on purpose and circumstances would presumably be rejected

244. See 2 FARNSWORTH, *supra* note 175, § 7.3, at 197-211 (discussing parol evidence rule). Although the parol evidence rule is universally accepted and embodied in the Uniform Commercial Code § 2-202, much debate has centered on its application. See *id.* § 7.3, at 202-04 (describing two differing views between Williston and Corbin concerning application of parol evidence rule to determine whether writing is either partially or completely integrated).

For a further discussion of the differing applications of the parol evidence rule, see *supra* note 243 and *infra* notes 245-49 and accompanying text.

245. 2 FARNSWORTH, *supra* note 175, § 7.3, at 197-98.

246. See *Stockton Dry Goods*, 227 P.2d at 2 (stating lease embodied "whole of the agreement" between landlord and tenant). Because the lease was the "whole of the agreement," the court prohibited the use of the parol evidence rule and thus excluded any evidence which would "enlarge" or explain the lease. *Id.* The court noted that its function was "to ascertain what in terms or in substance is contained in the instrument and not to insert what has been omitted." *Id.*

247. *Id.* at 3-4.

248. *Id.*

249. *Id.* at 4.

250. *Id.*

under intent theory. In rejecting extrinsic aids to implication, the court's approach is only moderately more favorable than the version of strict construction that led the plurality in *Great Atlantic & Pacific Tea Co.* to insist on express, precise language of the restriction rather than implications from language. The *Stockton Dry Goods* court's alternative argument, that the circumstances, if considered, were at best equivocal, employs a method that intent theorists would approve, although the court's conclusion against the tenant suggests the kinds of limits on intent analysis that were indicated above in the discussion of *Great Atlantic & Pacific Tea Co.*

Perhaps most interesting in considering the effect of *J.C. Penney* on cases like *Stockton Dry Goods* is an assessment of the impact that a vigorous intent effectuation theory would have on the parol evidence rule. As noted above, the proponent of an oral term that is consistent with (i.e., supplements) a written agreement fails to get the term in if the contract is completely integrated.²⁵¹ Under the classical approach to the parol evidence rule, advocated by Williston, the trial court makes the determination of complete integration by looking solely at the four corners of the writing; if the writing appears to be a final and complete expression of the parties' agreement, proof of supplementing terms is excluded.²⁵² The contradiction in this approach is apparent and was noted by Corbin.²⁵³ If the tenant in *Stockton Dry Goods* was right that an oral promise had been made, the lease agreement could not have been a *complete* integration of the parties' bargain, as it omitted the tenant's claimed term, unless the parties intended the writing to supersede the earlier oral agreement. But to make the determination, in the absence of a merger clause, that the writing was intended to supersede earlier understandings, the trial court would at least have had to get outside of the four corners of the lease to the extent of hearing evidence of the parties' intent to supersede prior agreements. Corbin went further, arguing that the trial court's determination of integration required consideration of all available

251. For a discussion of the parol evidence rule, see *supra* notes 243-49 and accompanying text.

252. 2 FARNSWORTH, *supra* note 175, § 7.3, at 202-03.

253. See *id.* at 203-04 (noting "[a]ccording to Corbin, account should always be taken of all circumstances, including evidence to prior negotiations, since the completeness and exclusivity of the writing cannot be determined except in light of those circumstances"); see also Arthur L. Corbin, *The Parol Evidence Rule*, 53 YALE L.J. 603, 630 (1944), reprinted in ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 582, at 448 (1960) (noting "[t]he writing cannot prove its own completeness and accuracy").

evidence of intent, including evidence of the disputed oral term itself.²⁵⁴

In brief, the parol evidence rule is one illustration of a dispute between classical contract law and modern contract law. The former places inordinate emphasis on the sanctity of the written agreement and little emphasis on the parties' intent and purposes, while the latter emphasizes intent and recognizes the fallibility of a writing to capture the parties' entire intent (on parol evidence issues) and of language to capture fully the parties' intended meanings (on interpretation questions). Put in these terms, *J.C. Penney* has attributed to the Pennsylvania Supreme Court a thoroughly modernist view in the assessment of noncompetition covenants. The difficulty with that attribution on parol evidence questions is that the Pennsylvania Supreme Court, in a case involving an alleged oral noncompetition promise, has authored one of the leading classical decisions on the parol evidence rule.²⁵⁵ The Third Circuit even recently noted that Pennsylvania courts still adhere to that case's rigorous and restrictive approach to parol evidence questions.²⁵⁶ Just as it was argued above that the unclear meanings derivable from circumstances serve to limit an intent approach to interpretation, it must be said here that the kind of vigorous intent theory propounded by *J.C. Penney* may be limited by countervailing rules like the parol evidence rule.

IV. CONCLUSION

Modern contract law reflects a shift—in broad outline and in many points of substance—away from the classical view of contracts developed between 1850 and 1930 and systematized in Williston's treatise and the first Restatement of Contracts. One hallmark of the modern approach is an emphasis on ascertaining the intent of the parties to the bargain on the basis of all available evidence of that intent, an approach which liberalizes the classical view on matters such as the statute of frauds, the parol evidence rule and interpretation.²⁵⁷

254. Corbin, *supra* note 243, § 583, at 474-75.

255. See *Gianni v. R. Russel & Co.*, 1126 A. 791 (Pa. 1924) (holding complete integration of writing is "conclusively presumed" from appearance of writing, without reference to circumstantial evidence).

256. See *Mellon Bank Corp. v. First Union Real Estate Equity & Mortgage Inv.*, 951 F.2d 1399 (3d Cir. 1991) (holding parol evidence rule not applicable if parties did not intend written contract to set forth entire agreement).

257. See generally CHARLES L. KNAPP & NATHAN M. CRYSTAL, *PROBLEMS IN CONTRACT LAW*, chs. 5-6 (3d ed. 1993) (comparing classical and modern views on statute of frauds, contract interpretation and parol evidence rule).

In according top priority to the attempt to ascertain the intent of the parties to a noncompetition covenant, and in rejecting the traditional reliance in lease cases on the rule of strict construction of restrictive covenants, the *J.C. Penney* court has predicted that the Pennsylvania Supreme Court would align itself with the modern approach to contracts. This Article suggests that the Third Circuit's prediction is good only to a certain extent. The prediction is supportable with reference to interpretation of the scope of a noncompetition covenant between the landlord and the tenant, although even there, the Pennsylvania Supreme Court's view of the parol evidence rule suggests some limits on intent theory. To extend intent effectuation into the realm of third-party rights under the recording acts—the specific situation in *J.C. Penney*—is to move onto more difficult ground. The policy of protecting subsequent purchasers, which underlies the recording acts, indicates a competing concern that must counter, to some extent, the laudable policy of implementing intent. On its specific facts, the *J.C. Penney* holding that Giant Eagle was bound by the terms of a subsequently-created extension of a previously-created pharmacy privilege is supportable.²⁵⁸ Read as a general holding that a shopping center tenant is always bound by subsequent modifications of contracts in order to effectuate the “interrelationships” created by the landlord, the decision would represent a dramatic and unwarranted intrusion of intent theory into the domain of recording acts. Finally, the court's suggested use of intent theory to find an implied limit on a tenant's freedom to use the premises under a lease that contains no express restriction on use is unsupportable because it impermissibly conflates the concerns underlying noncompetition covenants and the separate concerns underlying the general rule of strict construction of land use restrictions.²⁵⁹ Read within the suggested limits, however, the result in *J.C. Penney* represents creative judicial decision-making at its finest.

258. For a discussion of the facts and holding of *J.C. Penney*, see *supra* notes 14-30. For a discussion of how some parts of the court's analysis suggest answers to questions that were not before the court and that should have been avoided, see *supra* notes 136-38 and accompanying text.

259. For a further discussion of the use of intent theory, see *supra* notes 60-127 and accompanying text.